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No. _____

IN THE

Supreme Court of the United States

October Term, 1980

AG1 DENNIS R. BELLER,
Petitioner,

vs.

THE SECRETARY OF THE UNITED STATES NAVY;
CAPTAIN C.R. WARD, COMMANDING OFFICER,
FLEET NUMERICAL WEATHER CENTRAL,
MONTEREY, CALIFORNIA
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Questions Presented

1. Whether the Constitutional right to due process of law requires the Armed Forces to articulate standards or to set forth a rationale when an administrative decision by the Armed Forces results in adverse action to one of their members.

2. Whether administrative decisions by the Armed Forces must first be tested in the Armed Forces Board for Correction of Military Records before the federal courts obtain subject matter jurisdiction over the case.

3. Whether the Navy regulations, construed by the Court of Appeals as mandating discharge of those who engage in homosexual conduct, comport with due process of law.

LIST OF PARTIES TO THE
PROCEEDING IN THE COURT BELOW
(See App., infra, p.36a)

AGI DENNIS R. BELLER,
Plaintiff-Appellant

JAMES LEE MILLER,
Plaintiff-Appellant

MARY ROSEANN SAAL,
Plaintiff-Appellee.

J. WILLIAM MIDDENDORF,*
Secretary of the Navy,
Defendant - Appellant

DONALD H. RUMSFELD,
Secretary of Defense,
Defendant - Appellee.

* Mr. Middendorf has been replaced as Secretary of the Navy. At the time this Petition was prepared, a new Secretary has not been appointed. Therefore, this petition has been styled pursuant to Rule 40.4, naming the Secretary of the Navy, in his official capacity, as a Respondent.

LIST OF PARTIES TO THE
PROCEEDING IN THE COURT BELOW

(See App., infra, p. 56a)

AGI DENNIS R. BELLER,
Plaintiff-Appellant

JAMES LEE MILLER,
Plaintiff- Appellant

MARY ROSEANN SAAL,
Plaintiff-Appellee.

J. WILLIAM MIDDENDORF,
Secretary of the Navy,
Defendant- Appellant

DONALD H. RUMSFELD,
Secretary of Defense,
Defendant- Appellee.

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THE SECRETARY OF THE UNITED STATES NAVY; CAPTAIN C.R. WARD, COMMANDING OFFICER, FLEET NUMERICAL WEATHER CENTRAL, MONTEREY, CALIFORNIA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

To the Honorable Warren E. Burger, Chief Justice of the Supreme Court of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certicrari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered on October 23, 1980, as amended November 3, 1980, affirming the order of the United States District Court for the Northern District of California granting Respondents' motion for summary judgment.

OPINIONS BELOW

The opinions of the District Court are set out in the Appendix, infra, pp. 4a, 48a. The opinion of the United States Court of Appeals affirming the District Court is reported at 632 F.2d 788 (1980) and is set forth in the Appendix, infra, p. 56a. The order of the Court of Appeals

denying the petition for rehearing is set out in the Appendix, infra, p. 156a.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on October 23, 1980, was amended on November 3, 1980, and a timely petition for rehearing was denied on November 21, 1980. Jurisdiction to review the Court of Appeal's judgment is conferred on this Court by 28 U.S.C. § 1254(1).

STATES AND REGULATIONS INVOLVED

10 U.S.C. 1552(a) [App. p. 157a] which provides:

> (a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice.

32 Code of Federal Regulations 41.4 (a) (1976) [App. p. 171a] which provides:

> The Armed Forces have the right and duty to separate from the Service, with an appropriate characterization of service, those members who clearly demonstrate they are unqualified for retention. At the same time, such members have rights which shall be protected.

Secretary of the Navy Instruction 1900.9A [App. p. 161a.] which provided in pertinent part:

> Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization. In developing and documenting cases involving homosexual conduct, commanding

> officers should be keenly aware that members involved in homosexual acts are security risks who discredit themslves and the naval service by their homosexual conduct. Their prompt separation is essential. At the same time, every safeguard must be taken to insure against unjust action that will stigmatize an innocent person.

STATEMENT OF THE CASE

The Petitioner originally enlisted in the Navy on August 19, 1960. From that date, he served continuously on active duty, maintaining an exemplary service record. On August 29, 1962, Petitioner again re-enlisted for a period of six (6) years. During 1975, while

/ / /

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/ / /

Petitioner was assigned as an Aerographer's Mate First Class (a weatherman) assigned to a weather station at Monterey, California, the Navy decided that he required access to "Top Secret" information and initiated an investigation pertaining to the security clearance.

During this investigation, Petitioner was interrogated by an agent of the Naval Investigative Service and made a sworn statement on September 24, 1975 which, as found by the District Court, Appendix, infra, p. 6a, stated in pertinent part:

> Regarding my sexual activities I first engaged in sexual acts with males after my enlistment in the Navy. Since that time I have engaged in sex with males. I would not like to name any people that I have been engaged with. I have and do now beliv [sic] myself to be bisexual. I have been President of the Monterey Dons Motorcycle Club for 2 years.

> I have been in the Guilded Cage, Rightous [sic] Ram, known to be Gay Bars.

The statement made by Petitioner was referred to his commanding officer. An administrative discharge board was convened on November 28, 1975 to consider his discharge from the Navy as "unfit". This action was taken pursuant to Naval regulations which mandate processing for discharge of members of the Navy found to have engaged in homosexual acts.

At the administrative discharge board hearing, evidence was presented through Petitioner and other witnesses concerning fitness of Plaintiff to continue serving honorably in the Navy. As noted by the Court of Appeals in its decision, Appendix, infra, p. 146a, footnote 14, there was confusion among the members of the discharge board, or among Navy

discharge boards in general, as to their authority to recommend retention in the service for individuals being processed for discharge as "homosexuals."

The Administrative Discharge Board recommended that Petitioner be discharged from the Navy for "unfitness". After transmittal through military channels to the Chief of Naval Personnel, on December 19, 1975, he was ordered discharged from the Navy as "unfit." Petitioner obtained a temporary restraining order from the District Court. Jurisdiction was alleged under 28 U.S.C. § 1331, 28 U.S.C. § 1361, and 5 U.S.C. § 552(a). His motion for preliminary injunction was denied. Appendix, infra, p. 147a.

The Navy subsequently moved the District Court for summary judgment in

its favor, which was granted. Appendix, infra, p. 48a. A timely notice of appeal to the United States Court of Appeals for the Ninth Circuit was filed. Petitioner's case was consolidated with two other cases involving separation of alleged homosexuals by the Navy, Miller v. Rumsfeld, and Saal v. Middendorf, Appendix, infra, p. 56a.

In an opinion filed October 23, 1980, Appendix, infra, p. 56a, the actions of the Navy were upheld as to all three plaintiffs and in favor of the Navy by the Court of Appeals on November 3, 1980, Appendix, infra, p. 154a. A petition for rehearing by Beller was filed and denied by the Court of Appeals on November 21, 1980, Appendix, infra, p. 156a.

REASONS FOR GRANTING THE WRIT

1. A decision by this Court is necessary to secure uniformity of decision.

The decision by the Court of Appeals that the discretion to discharge or retain those found to have engaged in homosexual acts is not subject to judicial review is directly contrary to the decisions of the Court of Appeals for the District of Columbia in Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978) and Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978).

In Matlovich, the District Court had granted the Government's motion for summary judgment on the grounds that (1) "there is no constitutional right to engage in homosexual activity;" (2) that the discharge policy satisfied the "rational

basis" test of due process; and (3) that Matlovich "had not proved that an exception had to be made in his case." (591 F.2d 854). The Court of Appeals declined to decide the constitutional challenges to the Air Force discharge policy. Instead, it vacated the decision granting summary judgment and remanded with instructions to direct the Air Force to provide a statement:

> .... which will show the reviewing court that improper considerations were not taken into account, that the particular airman was not treated differently from others in the same position, and that there is a rational basis for the refusal to retain this serviceman.

591 F.2d 860.

Citing numerous cases from this Court and the Courts of Appeal, the District of Columbia Circuit held that

remand was necessary to comply with the "normal rule" that where discretionary administrative action is to be reviewed, the agency must provide sufficient indication of the reasons for its decision (591 F.2d at 857).

In Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978), the Court of Appeals for the District of Columbia again remanded for articulation and explanation of the Navy's policy and the application of those standards to a discharged Naval officer (591 F.2d at 851[footnotes omitted])]:

> Although the Navy regulation on homosexuality (SECNAVIST 1900. 9A (July 14, 1971)) does not in terms provide any exception to the general policy of separating homosexuals, the Navy has interpreted it as not mandating separation in all cases. See Champagne v. Schlesinger, 506 F.2d 979, 983, 984 (7th Cir. 1974). The Board

which considered appellant's case was instructed that it had discretion to recommend retention. Judge Gesell recognized that, under the Navy's regulation and policy, discharge was discretionary but felt that he had no basis for overturning the Navy's negative determination. 436 F.Supp. at 79, 83. He said, however, that "it would be helpful for the Navy to clarify the considerations which apparently govern the circumstances under which a homosexual, as a matter of discretion, may be retained." 436 F.Supp. at 83.

As in Matlovich, we cannot tell why Berg failed of retention or appraise that exercise of discretion. The Administrative Discharge Board found that his record in the service did not reflect such an outstanding potential as a naval officer as to militate against separation. The District Court observed that, though he "was a fine officer," "there is nothing in his record that marks him as being unusual or especially valuable to the Navy." 436 F.Supp. at 83. But we have nothing to show or indicate that these very general and very imprecise standards represent Navy policy, or that they have been applied in the past or are being applied currently, or that they sum up the actual considerations which went

> into the Navy's ultimate decision not to retain Berg. It is proper, therefore, to call upon the service for a fuller articulation and explanation of its policy on retention of homosexuals and the application of those standards to Berg's case.

The decision below is also in conflict with Champagne v. Schlesinger, 506 F.2d 979 (7th Cir. 1974), where the Seventh Circuit held, at the urging of the Navy, that "there is room under the regulations for the use of discretion in individual cases of homosexual conduct." Exhaustion of remedies to the Board for Correction of Naval Records was required in order to "give the Navy an opportunity to adopt a narrowing construction of its regulation" in order to facilitate judicial review and to give the discharged seamen an opportunity to challenge the propriety of the discharges as applied to them. (506 F.2d at 984). The Ninth Circuit held

in the case at bar that exhaustion to Board for Correction of Records was not required, see App., infra p.

The judgment in the instant Petition goes far beyond the rights of service personnel processed for discharge because of homosexual conduct in importance. The decision is contrary to a series of Courts of Appeals decisions holding that meaningful review of military discharges requires articulated reasons, a requirement that cannot be satisfied "by a bare recitation . . . of the ultimate statutory [regulatory] criteria . . . ." United States ex rel. Checkman v. Laird, 469 F.2d 773, 787 (2d Cir. 1972). See also, United States v. Haughton, 413 F.2d 736 (9th Cir. 1969).

In Crawford v. Cushman, 531 F.2d

1114 (2d Cir. 1976), the Court of Appeals for the Second Circuit held that upon an allegation that a military official had acted beyond his powers, his actions are reviewable and when a military regulation sets up what is in effect an irrebuttable presumption, such presumptions may well be unconstitutional. Crawford clearly stands for the proposition that the Armed Forces must take an individual approach to the disability of its members to determine whether or not such members, individually, may be involuntarily separated from the service. See also, Sanger v. Seamans, 507 F.2d 814, 817 (9th Cir. 1974):

> This requirement [of reasons] is dictated by basic considerations of fairness: The in-service applicant [for release because of conscientious objections] should know the reasons for the denial of his applica-

> tion so that he may be able effectively to seek judicial relief . . . Moreover, the reviewing court must know the reasons for the adverse decision in order adequately to review the Secretary's decision within the narrow scope permitted.

The court below determined that it was "limited to determining whether or not the Constitution prohibits the Navy from adopting the rule before us." (App., p. 58a) This statement referred to the Navy's blanket exclusion of homosexual personnel and the regulatory proceedings prescribed for separating such persons. Petitioner had not advanced an argument that homosexual personnel have a Constitutional right to remain in the Armed Forces. He has maintained that he was entitled to articulated reasons why he should not be considered as an exception to the general policy. This Court is

respectfully urged to grant this Petition to resolve the conflict with other Courts of Appeal on the same matter. (See Rule 19(b), Revised Rules of the Supreme Court of the United States.)

In addition to the conflict in the circuits regarding a Constitutional right to reasoned disposition of an administrative claim by a member of the Armed Forces, the state of the law regarding subject matter jurisdiction of the federal courts in cases involving administrative claims by members of the Armed Forces, is also in serious disarray. In Craycroft v. Ferrall, 397 U.S. 335 (1970), upon concession by the Solicitor General, this Court held administrative remedies to the Boards for Correction of Records, established under 10 U.S.C. 1552, would not be required in administrative claims

to conscientious objector status.

In addition to the conflict between the Ninth Circuit, in the instant case, not requiring exhaustion to the Board for Correction of Records, and the Seventh Circuit in Champagne v. Schlesinger, et al., supra, the conflict is further shown by decisions from other circuits. For example, in Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975), and in Hayes v. Secretary of Defense, 515 F.2d 668 (D.C. Cir. 1975), the Court of Appeals for the District of Columbia Circuit held that exhaustion would not be required in military administrative cases. In Hodges v. Calloway, 499 F.2d 417 (5th Cir. 1974), the United States Court of Appeals for the Fifth Circuit stated that that Circuit had long and firmly

adhered to the rule military plaintiffs must exhaust their remedies to the Boards for Correction of Records before the federal courts would take jurisdiction. 499 F.2d at 420. The Sixth Circuit appears to adhere to this rule, Seepe v. Department of the Navy, 518 F. 2d 760 (6th Cir. 1975), as does the Second Circuit, Michaelson v. Herren, 242 F.2d 693 (2nd Cir. 1957). Also instructive on this issue is Nelson v. Miller, 373 F.2d 474 (3rd Cir. 1967); Bard v. Seamans, 507 F.2d 765 (10th Cir. 1974); Downen v. Warner, 481 F.2d 642 (9th Cir. 1973).

2. The decision below raises important questions of federal law that should be decided by this Court.

This court has never given plenary consideration to a case where federal

constitutional rights have been claimed to have been infringed on account of an individual's private homosexual conduct.* By its decision upholding the constitutionality of the Navy's blanket disqualification of persons who have engaged in such acts, the decision below raises "important questions of federal law which have not been, but should be, settled by this Court." (Rule 19(b), Revised Rules of the Supreme Court of the United States.)

Numerous decisions by lower federal courts and by state courts have adjudicated the question of the extent to which the Federal Constitution may limit state

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*/ Boutilier v. INS, 387 U.S. 188 (1967) decided only that Congress intended to include homosexuals in the term "psychopathic personality". No serious claim was made that Congress could not constitutionally exclude homosexuals under the Immigration and Nationality Act.

or federal sanctions on homosexual conduct. (See, e.g., Symposium, Sexual Preference and Gender Identity, 30 Hastings L.J. 799 (1979); Homosexuality and the Law, 5 J. of Homosexuality 5 (1980)). As the decision below recognized, these cases turned on, or were perceived to depend upon, whether consensual private homosexual conduct is protected by the due process or equal protection clauses of the Federal Constitution. The case law is in disarray.

Compare Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1961) with Singer v. Civil Service Commission, 530 F.2d 247 (9th Cir. 1976) cert. granted 429 U.S. 1034 (1977) (Federal Civil Service Regulations); compare Morrison v. State Board of Education, 1 Cal.3d 214, 461

P.2d 375 (1969) with Gaylord v. Tacoma School Dist., 88 Wn.2d 286, 559 P.2d 1340 (1977) cert. denied 474 U.S. 879 (1977) (schoolteachers); compare Gay Law Students Assoc. v. P.T. & T., 24 Cal.3d 458; 156 Cal.Rptr. 14 (1979) with DeSantis v. Pacific Tel. & Tel., 608 F.2d 327 (9th Cir. 1979) (private employment discrimination); compare People v. Onofre, ____ N.Y. (1980) with Doe v. Commonwealth's Attorney, 403 F.Supp. 1199 (E.D. Va. 1975) summarily aff'md 425 U.S. 901 (1976) (constitutionality of state sodomy statutes); compare In re Labady, 326 F.Supp. 924 (S.D.N.Y. 1971) with In re Nemetz, 485 F.Wupp. 470 (E.D. Va. 1980) (naturalization).

Much of the confusion surrounding application of these important questions of federal constitutional law has been

exacerbated by the seemingly conflicting summary affirmance by this Court of Doe v. Commonwealth's Attorney, supra, and its footnote reference in Carey v. Population Services International, 431 U.S. 678, 688 n.17 (1977) that "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults."

The time is ripe for this Court to address this question. As Justice Rhenquist argued in his dissent from the denial of certiorari in Ratchford v. Gay Lib, 434 U.S. 1080 (1978):

> There is a natural tendency on the part of any conscientious court to avoid embroiling itself in a controversial area of social policy unless absolutely required to do so. . . . . Unlike the District Court and the Court of Appeals,

> Congress has accorded us . . . the discretion to decline to hear a case such as this on the merits without explaining our reasons for doing so. But the existence of such discretion does not imply that it should be used as a sort of judicial storm celler to which we may flee to escape from controversial or sensitive cases.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

RICHARD P. FOX*

DONALD C. KNUTSON

STEPHEN W. PARRISH

Attorneys for Petitioner

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*/ Counsel of Record

APPENDIX

THE DISTRICT COURT OF THE UNITED STATES

NORTHERN DISTRICT OF CALIFORNIA

AGI DENNIS R. BELLER, Plaintiff, v. THE HONORABLE J. WILLIAM MIDDENDORF, SECRETARY OF THE NAVY: CAPTAIN C. R. WARD, COMMANDING OFFICER, FLEET NUMERICAL WEATHER CENTRAL, MONTERY, CALIFORNIA, Defendants.	)	CIVIL NO. C 75 2747 ORDER

Based upon the Application for Temporary Restraining Order, Motion for Preliminary Injunction, Memorandum of Points and Authorities and Affidavit in Support Thereof, and specifically based upon the irreparable injury which would result to the Plaintiff herein, and the lack of apparent injury to the Defendants herein, as well as the prima facie

showing of constitutional and statutory violations of Plaintiff's rights;

IT IS ORDERED the Defendants, their agents, employees, attorneys, and all persons subject to their commands and orders and directives, shall take no action whatsoever to order Plaintiff to be discharged or separated from active duty in the United States Navy, or to otherwise remove him from the geographical jurisdiction of this Court until such time as Ordered by this Court.

The 8th day of January, 1976.

SPENCER WILLIAMS
UNITED STATES DISTRICT JUDGE
12/29/75
4:45 P.M.

PRESENTED BY:

RICHARD P. FOX
Attorney for Plaintiff

MAX GEST
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AGI DENNIS R. BELLER, Plaintiff, v. THE HONORABLE J. WILLIAM MIDDENDORF, Secretary of the Navy; CAPTAIN C.R. WARD, Commanding Officer, Fleet Numerical Weather Central, Monterey, California, Defendants.	Civil No. 75-2747 GBH

MEMORANDUM OF DECISION

Plaintiff Dennis R. Beller is an Aerographer's Mate first class on active duty with the United States Navy and assigned to the Fleet Numerical Weather Station, Monterey, California. Plaintiff is before the court on his motion for a

preliminary injunction enjoining the Navy from administratively discharging him for unfitness due to homosexual activity.

The court has previously granted plaintiff's motion for a temporary restraining order.

The facts in the case are not disputed. Plaintiff was born on September 23, 1941. He enlisted in the United States Navy on August 19, 1960. From that date until the present he has maintained an exemplary service record, attested to by the numerous commendatory reports which appear in his service file.

On August 29, 1972, plaintiff re-enlisted for a six-year term. In the latter part of 1975 plaintiff was informed that the Navy desired to upgrade his security clearance to permit him access to "Top Secret" information. During the course

of a routine background investigation of plaintiff, Navy personnel discovered that plaintiff had had contacts with homosexual groups since entering the navy.

This information was turned over to the Naval Investigative Service for investigation concerning plaintiff's homosexual involvement. During said investigation, plaintiff provided a sworn statement on September 24, 1975 which recited in pertinent part:

> Regarding my sexual activities I first engaged in sexual activity with males after my enlistment in the Navy. Since that time I have engaged in sex with males. I would not like to name any people that I have been engaged with. I have and do beliv [sic] myself to be bisexual. I have been President of the Montery Dons Motocycle Club for 2 years. I have been in the Gilded Cage, Rightous [sic] Ram, known to be gay bars.

An administrative discharge board was

thereupon appointed on October 20, 1975, and convened on November 18, 1975, to consider plaintiff's possible administrative discharge by reason of unfitness.

The pertinent regulations here are Bureau of Naval Personnel Manual [BUPERSMAN] §3420220 (32 C.F.R. §730.12) and the implementing policy in Secretary of the Navy Instruction [SECNAVINST] 1900.9A.

The relevant portions of BUPERSMAN §3420220 provide:

> 2. Members may be separated by reason of unfitness with an undesirable discharge or with a more creditable type discharge when it is warranted by the particular circumstances in a given case. A discharge by reason of unfitness, regardless of the attendant circumstances, shall be effected only when directed by or authorized by the Chief of Naval Personnel.
>
> 3. Members may be recommended for discharge by reason of unfitness for:
>
> * * * * *

e. Homosexual acts. Processing for discharge is mandatory. (See SECNAVINST 1900.9 series for controlling policy and additional action required in cases involving homosexuality.)

SECNAVINST 1900.9A sets forth the following relevant policy:

> Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization. In developing and documenting cases involving homosexual conduct, commanding officers should be keenly aware that members involved in homosexual acts are security and reliability risks who discredit themselves and the naval service by their homosexual conduct. Their prompt separation is essential. At the same time, every safeguard must be taken to insure against unjust action that will stigmatize an innocent person. SECNAVINST 1900.9A.4.

The Instruction describes the "degrees of homosexuality" in subsection 4b:

> This instruction is not limited in its application to "true," "confirmed," or "way of life" homosexuals. Knowing participation in a homosexual act or strong tendencies toward such

acts constitutes a sufficient basis for proceeding hereunder, and the existence or absence of prior, similar conduct will be considered as matter in mitigation or aggravation.

The Instruction also defines four classes of homosexual conduct, of which the following are relevant there:

(2) Class II

(a) Definition. Persons who, while in the naval service, have engaged in one or more homosexual acts, or have attempted homosexual acts, or have solicited a homosexual act under aggravated conditions, or whose acts do not fall in the categories of Class I, Class III, or Class IV.

* * * * *

(3) Class III

(a) Definition. Persons who exhibit, profess, or admit homosexual tendencies, or who solicit a homosexual act in absence of aggravated circumstances, and whose conduct does not come within the cagegories of Class I, II, or Class IV.

* * * * *

Plaintiff was represented by counsel at the administrative discharge board hearing. Upon direct examination by his counsel, plaintiff characterized himself as "bisexual." Counsel for plaintiff presented evidence through plaintiff and other witnesses concerning the fitness of someone with plaintiff's predilections to honorably serve in the armed forces.

The administrative discharge board recommended that plaintiff be given an honorable discharge based upon unfitness. This recommendation was forwarded to the Chief of Naval Personnel on December 9, 1975. On December 19, 1975, the Chief of Naval Personnel ordered plaintiff's discharge (honorable) for unfitness, but before plaintiff's local command completed the discharge action, plaintiff filed his complaint and was granted a temporary restraining order by this court.

Plaintiff's complaint alleges jurisdiction under 28 U.S.C. §§1331 and 1361 and under 5 U.S.C. § 552(a). The complaint alleges that defendants' conduct amounts to a breach of his enlistment contract; that the decision to discharge plaintiff was violative of his rights to privacy and substantive due process; and that he is entitled to an injunction against his separation, a declaration of rights under his enlistment contract, and damages for violations of the Privary Act. Plaintiff further alleges that he has exhausted all administrative remedies available to him.

In their opposition to plaintiff's motion for a preliminary injunction, defendants have raised several legal issues, each of which is addressed hereinbelow.

I. Exhaustion of Administrative Remedies

Defendants contend that plaintiff must first seek relief from an available administrative tribunal, the Board for Correction of Naval Records [BCNR], prior to seeking judicial review. Defendants cite cases which support the BCNR's authority to grant plaintiff the full relief requested here as well as cases which have required exhaustion of administrative remedies in military discharge cases.

Plaintiff, on the other hand, argues that exhaustion is not required where, as here, the only issue is one of constitutional law. Plaintiff also relies upon the recent case of Rew v. Ward, 402 F.Supp. 331 (D. N.M. 1975), in which the court discussed the ineffectiveness of military review boards.

The BCNR exists pursuant to 10 U.S.C. §1552 and the implementing regulations of 32 C.F.R. §723. Its broad remedial powers

include the ability to recommend reinstatement, correction of records, and the award of backpay if appropriate. E.G., Hodges v. Callaway, 499 F.2d 417, 422 (5th Cir. 1974)

In Champagne v. Schlesigner, 506 F.2d (7th Cir. 1974), two female seaman apprentices in the United States Navy admitted to homosexual activity before a field board convened to consider their dismissal. After the district court denied the plaintiffs' motion for interim injunctive relief, each woman received a general discharge under honorable conditions. On appeal from the district court's grant of defendants' motion for summary judgment, the circuit court addressed the issue of plaintiff's failure to exhaust their administrative remedies by seeking relief from the BCHR.

The plaintiffs in Champagne argued that review before the BCNR would be futile

because the applicable Navy policy made discharge for homosexuality mandatory, but defendants responded that there was room under the regulations for the use of discretion in individual cases of homosexual conduct. The appellate court concluded that because plaintiffs had already been discharged, and because of the representations made that the Navy might adopt a narrowing construction of its regulation, the district court should have dismissed the complaint without prejudice pending the exhaustion of plaintiffs' appeal to the BCNR.

Although the Champagne case bears some resemblance to the instant case, it is distinguishable in several particulars. First, the appellate court there noted that little harm would ensue by requiring plaintiffs to exhaust, since they had already been discharged. Here, of course, the very motion

before the court seeks to enjoin discharge. Second, the defendants in Champagne took the position that the applicable regulations did not require mandatory discharge of homosexuals. The court found that requiring exhaustion would give the Navy an opportunity to adopt a narrowing construction of its regulation. The court based this position on a representation from the Secretary of Defense, who was a party therein, that the applicable regulation did not mandate discharge whenever homosexuality is proved. In the instant case, however, no such representation has been forthcoming, and the Navy has not taken the position that there is discretion in the application of the regulation which might permit the BCNR "to adopt a narrowing construction." Third, the court in Champagne placed some reliance on the fact that one member of the field

board recommended retention of plaintiffs, thus supporting the view that discharge might be permissive only. No such situation exists here. Fourth and last, the court in Champagne relied on the facts and representations before it to find that, despite its clear language, the regulation might not be mandatory. This court cannot accord the strong language of the regulation such a reading: it clearly intends that those engaging in homosexual conduct will be discharged without exception.

Although the general rule does require exhaustion of administrative remedies, it is subject to several exceptions. One such exception occurs where the effort to exhuast would be futile. See Seepe v. Department of the Navy, 518 F.2d 760, 762 (6th Cir. 1975). The facts before this

court indicate that it would be futile for plaintiff to seek relief before the BCNR, since the regulation is absolute on its face, and defendants have not represented that there is any leeway in the matter--nor have defendants cited any authority in which a contention such as plaintiff's has been upheld. It is noteworthy, too, that despite the ostensible opportunity for the Navy to adopt a narrowing construction of its regulation in Champagne, there is no evidence before this court that it has in fact done so.

Related to the futility argument is the strong contention that military review boards have simply proved innefective in granting the kind of review or relief sought herein. In Rew v. Ward, supra, an airman sought to have his administrative discharge from the Air Force declared

unlawful because of the failure to accord him certain procedural safeguards. Although the court found against the plaintiff therein on the merits, it rejected the contention that the plaintiff should have first exhausted his administrative remedy before the Air Force Board for the Correction of Military Records.

Relying in part on the findings of law review articles concerning the operation of military review boards, the court in Rew made a finding equally applicable herein:

> When one scrutines the specific administrative system here involved, the Air Force Board for Correction of Military Records, in light of the foregoing policies, as McKart [v. United States, 395 U.S. 185 (1969)] instructs the court to do, it becomes all too apparent that due to fiscal neglect and the lack of legislative reford the BCMR is totally inept at handling with fairness questions such as those raised by the plaintiff herein. 402 F.Supp. at 334.

Finally, it must be noted that the only

issue before this court, and the only one that could be presented to an administrative board in any event, is a purely legal one involving constitutional considerations. There is here no question of fact, or issues concerning the proper application of military procedure or regulations, matters more within the competence of the BCNR. There is a line of authority which rejects exhaustion where the issues in question are purely legal and require no exercise of military discretion or expertise. See Committee of GI Rights v. Callaway. 518 F.2d 466 474 (D.C. Cir.1975); Downen v. Warner, 481 F.2d 642, 643 (9th Cir. 1973); Unglesby v. Zimny, 250 F.Supp. 714, 717 (N.D. Ca. 1965). Cf. 3 Davis, Administrative Law Treatise §20.04 at 74 (1958). But see Bard v. Seamans, 507 F.2d 765, 768 (10th Cir. 1974).

II. Subject Matter Jurisdiction

Defendants contend that the court lacks jurisdiction in this matter, except for the Privary Act allegations. Defendants argue that no federal question has been alleged to confer jurisdiction under 28 U.S.C. §1331, and that mandamus jurisdiction does not lie under 28 U.S.C. §1361 because there is no clear right in the plaintiff to the relief sought nor a clear duty by defendants to provide the same.

Defendants concede that jurisdiction exists to entertain plaintiff's allegations of the Privacy Act, 5 U.S.C. §552a, but they point out that remedies thereunder are limited to damages and costs, not injunctive relief. 5 U.S.C. §552a(g)(4).

Certainly a claim under 28 U.S.C. §1331 will not confer jurisdiction where it

is frivolous, insubstantial and made merely to secure federal jurisdiction. Preston v. Purtell, 410 F.2d 234, 236 (7th Cir. 1969). The Claims in the instant case, however, are neither frivolous nor pretextual. Although the particular applicability of §1331 to claims such as those now before the court has not often been expressly passed upon, numerous cases have assumed jurisdiction under §1331 in similar contexts. E.g., Bard v. Seamans, supra at 767n.3 (§1331 available where jurisdictional amount properly shown); Mindes v. Seaman, 453 F.2d 197, 200 (5th Cir. 1971); Rew v. Ward, supra at 333n. 7; Baldauf v. Nitze, 261 F.Supp. 167, 168 (S.D. Cal. 1966); Lundig, "Judicial Review of Military Administrative Discharges," 83 Yale L. J. 33, 62 (1973). See also Murray v. United States, 154 Ct. Cl. 185 (1961), a case similar to

the instant one in several respects. Cf. Reed v. Franke, 297 F.2d 17, 21 (4th Cir. 1961) (relied upon generally equity jurisdiction).

The language of 28 U.S.C. §1361 has been construed to mean that mandamus will not lie unless the claimed duty imposes a mandatory or ministerial obligation; if the claimed duty is discretionary or directory, the duty is not "owed." Short v. Murphy, 512 F.2d 374, 377 (6th Cir. 1975). See also Lundig, "Judicial Review of Military Administrative Discharges," supra at 64. Although the Ninth Circuit found in Jarrett v. Resor, 426 F.2d 213, 216 (9th Cir. 1970) that mandamus would not lie to compel the plaintiff's discharge from the military as a conscientious objector, other cases have found jurisdiction under §1361 where there is

a challenge to a court martial., Baker v. Schlesinger, 523 F.2d 1031, 1035 (6th Cir. 1975); Angle v. Laird, 429 F.2d 892 (10th Cir. 1970), cert. den., 401 U.S. 918 (1971); Ashe v. McNamara, 355 F.2d 277 (1st Cir. 1965), and there is authority for finding jurisdiction under §1361 in the instant case. See Rew v. Ward, supra at 333n.7; Dowler v. Schlesinger, 384 F.Supp. 39, 41 (D. Md. 1975) (reserve officer on active duty in Air Force sought a preliminary injunction against his involuntary separation due to a Congressionally-mandated reduction in force).

Defendants argue in the alternative that plaintiff's claim is merely one for breach of contract, and that as such jurisdiction lies exclusively in the Court of Claims under 28 U.S.C. §§1346(a)(2) and 1491.

Plaintiff's allegation of breach of contract is clearly not at the heart of his case, and in any event it has been held that the Court of Claims is the exclusive forum only where a claim for money forms the crux of a case, which is not the situation here. The cases cited by defendants all concern a claim for backpay and a finding that the complaint is essentially one for a money judgment. See Mathis v. Laird, 483 F.2d 943 (9th Cir. 1973); Carter v. Seamans, 411 F.2d 767, 771-772 (5th Cir. 1969), cert. den., 397 U.S. 941 (1970); Parrish v. Seamans, 343 F. Supp. 1087, 1093-1094 (D. S.C. 1972), affirmed, 485 F.2d 571 (4th Cir. 1973).

Carter and Parrish were thus distinguished in Melvin v. Laird, 365 F.Supp.

511 (E.D. N.Y. 1973). The court in Melvin found that although today both the district court and the Court of Claims can issue monetary and non-monetary judgments, this does not render Court of Claims jurisdiction exclusive:

> The legislative background, however, leaves little doubt that the added powers of the Court of Claims to grant incidental relief were in no way intended to oust the jurisdiction of the district courts to act pursuant to its mandamus and delcaratory judgment powers. [Citations omitted.] 365 F.Supp. at 518.

The Court went on to note that in the only two cases where district court jurisdiction had been declined, Carter and Parrish, monetary relief was at the heart of the claim, whereas in the case before it that was not true. Id. at 520.

Here, too, the primary relief sought is not merely monetary, and so Carter-Parrish

cannot be considered to oust this court from its otherwise proper jurisdiction in favor of that in the Court of Claims.

III. The Propriety of a Preliminary Injunction

It is well established that in order to obtain a preliminary injunction the moving party must demonstrate the existence of the following factors:

A) Irreparable injury in the absence of preliminary relief, i.e. no adequate legal remedy;

B) Absence of substantial harm to others if relief is granted;

C) Compatability of the relief requested with the public interest; and

D) A strong showing of probable success on the merits.

See MacKay v. Hoffman, 403 F.Supp. 467, 470 (D. D.C. 1975).

A. Irreparable Injury

Defendants argue that plaintiff has not shown that he will be irreparably injured if he is discharged because the temporary loss of income, which can be remedied upon a showing of wrongful discharge by reinstatement and the award of backpay, is not irreparable injury. Defendants rely here on Sampson v. Murray, 415 U.S. 61 (1974), wherein the plaintiff, a probationary civil service employee, sought to enjoin her discharge from employment pending an administrative appeal to the Civil Service Commission. The district court granted the temporary relief sought and the court of appeals affirmed.

The Supreme Court reversed, finding that Murray had failed to show the existence of irreparable injury. No witnesses had been heard on that topic, the complaint was

unverified, and the plaintiff's affidavit did not discuss such injury. Id. at 88. The Supreme Court concluded that neither the temporary loss of income nor the allegation of damage to reputation nor both together constituded such irreparable injury as to support the grant of injunctive relief in the case before it. Id. at 89-92. In a footnote, the Court expressed a possible limitation upon its ruling:

> We recognize that cases may arise in which the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found. Such extraordinary cases are hard to define in advance of their occurrence. We have held that an insufficiency of savings or difficulties in immediately obtaining other employment--external factors common to most discharged employees and not attributable to any unusual actions relating to the discharge

> itself--will not support a finding of irreparable injury, however severely they may affect a particular individual. But we do not wish to be understood as foreclosing relief in the genuinely extraordinary situation. *** Id. at 92n.68.

Subsequent cases have attempted to limit the reach of Sampson still further. Thus the court in Marsden v. United States Postal Service, 390 F.Supp. 329, 337 (D. Minn. 1974) distinguished Sampson on the basis that the plaintiff before it was a veteran and not a probationary employee, and that Sampson dealt with a factual issue while it was concerned solely with a legal one.

In American Fed. of Gov. Employees Loc. 1858 v. Callaway, 398 F.Supp. 176, 193-194 (N.D. Ala. 1975), the plaintiffs were Army civil service employees who moved for a preliminary injuction to prevent the Army from effecting a reduction in force at an

Alabama missile installation. The district court granted plaintiffs' motion for preliminary injunction, and in so doing distinguished Sampson and found sufficient irreparable injury. Unlike the situation in Sampson, the court in American Federation had received a great deal of testimony demonstrating numerous examples of irreparable injury to the plaintiffs. Id. at 193. The court also noted that the plaintiffs before it were more than probationary employees, and that at least some of the plaintiffs would be unable to later recover backpay or damages. Id. at 194n.3. Finally, the court found that, despite the ruling in Sampson, no irreparable injury need be shown where there exists a valid constitutional claim of a protected property right. Id. at 195.

Despite the decisions in Marsden and American Federation, we think the present situation is governed by Sampson and the recent case of MacKay v. Hoffman, supra, wherein the court denied temporary injunctive relief to a reserve captain in the United Stat-s Army who was to be administratively separated from active duty by reason of his nonselection for promotion. The Court found that the plaintiff carried a burden heavier than ususal because he sought to compel the United States to keep him in its employ during the pendency of his lawsuit. The court denied plaintiff's motion for a preliminary injunction, finding that his relief from active duty prior to a resolution of his administrative appeal would not amount to irreparable injury.

Here, too, plaintiff has failed to

demonstrate that the injury he may suffer is "irreparable," since, as discussed above, he can be fully compensated for his losses if he eventually prevails on the merits of his claim.

Nor is plaintiff irreparably injured by receiving an honorable discharge, albeit for unfitness. The cases recognize that because most discharges are honorable, anything less than an honorable discharge stigmatizes the recipient and is punitive in nature. Denton v. Secretary of Air Force, 483 F.2d 21, 23n. 2 (9th Cir. 1973); Unglesby v. Zimny, supra at 717. Yet plaintiff herein has received an honorable discharge, and the law does not support a finding of stigmatization under this circumstance. See Heisel v. Chalbeck, 405 F.Supp. 361, 362 (M.D. Fla. 1976).

Plaintiff contends that since his

discharge is for unfitness--homosexuality--his job opportunities will be jeopardized, but he has not presented proof in support of this contention. In any event, if plaintiff eventually succeeds on the merits of his claim, whether in this court or some other forum, he can be made whole and returned to the status he desires; the revelation of his sexual conduct, however, is a fait accompli and cannot be undone no matter what this court rules. If, on the other hand, plaintiff does not succeed on the merits, then he can complain of no legal injury by reason of his discharge, since his challenge is to the fact rather than the characterization of his discharge. Therefore, plaintiff will not be irreparably injured within the meaning of the law if the prayed-for preliminary injuction is not granted.

B. Harm to Others

No evidence is before the court of any particularized harm that would befall others whether plaintiff's motion for a preliminary injunction is granted or not.

C. Public Interest

Defendants contend that to retain plaintiff in the Navy in his present uncertain status would disrupt personnel planning and assignment and would prompt others to disregard military regulations. Defendants also claim that since plaintiff has been found unfit for military service, the Navy would be harmed if he were retained.

As an individual case, it would appear that the harm to be suffered by the Navy were the plaintiff retained is less than that to be suffered by the plaintiff upon his discharge. But there is a larger interest at stake here, for if the court accepts

the policy considerations stated in SECNAVINST 1900.9A, a decision for the plaintiff on the merits herein would jeopardize the Navy's desire for stability and reliability as articulated in its provisions on homosexuality. To what extent that desire is achieved is discussed infra.

D. Success on the Merits

The central question in an application for a preliminary injunction concerns the likelihood of the movant's ultimate success on the merits.

Two of plaintiff's three claims can be quickly disposed of.

The claim under the Privacy Act has not been established to the court's satisfaction, and, as found hereinabove, in no event would that claim entitle plaintiff to the injunctive relief which is the subject of his motion now before the court.

Plaintiff has also attempted to state a claim for breach of his enlistment contract, but under the applicable authority he has failed to demonstrate a likelihood of succeeding on this claim. See Waller v. United States, 451 F.2d 1273, 1276 (Ct.Cl. 1972); Lowell v. Keef, 185 Ct.Cl. 454, 463-464 (1968); Dowler v. Schlesigner, supra at 42.

Plaintiff's third and most substantial claim is summarized in paragraph 21 of his complaint:

> The decision to separate Beller was in violation of his statutory rights, as well as his constitutional rights to privacy and to due process of law. Specifically, the Navy's definition of "homosexual" are [sic] violative of substantive due process of law, in that the Navy's definition of this term would include any member of the Navy who has ever even patted affectionately a member of the same sex.

Defendants correctly point out that the decision to discharge administratively is

a discretionary one. The authority to discharge a regular englisted member of the Navy is granted by 10 U.S.C. §§1169. The Navy has promulgated regulations, such as those cited hereinabove, with respect to discharges based on unfitness. Such regulations have the force of law. Rehart v. Clark, 448 F.2d 170, 173 (9th Cir. 1971).

Normally, military discretionary decisions are judicially reviewable only in the following limited circumstances: to determine whether the procedures employed by the military comport with the requirements of procedural due process; and to determine whether the military has acted within its legal jurisdiction. See Hoersch v. Froehlke, 382 F.Supp. 1235, 1239n.21 (E.D. Pa. 1974). The standard or review is whether the

military's decision is "arbitrary and capricious" or "unsupported by substantial evidence." Sanford v. United States, 399 F.2d 693, 694 (9th Cir.)

Plaintiff does not challenge the authority of the Navy to adopt and enforce regulations pertaining to administrative discharge for members engaged in homosexual conduct. Plaintiff's attack here is limited to the allegation that the definition of proscribed homosexual conduct in SECNAVINST 1900.9A includes isolated and innocuous conduct; i.e., the definition is either too vague, or too broad, or both.

The doctrine of vagueness incorporates notions of fair notice or warning. Smith v. Goguen, 415 U.S. 566, 572-573 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108 passim (1972). A

statute will be considered constitutionally vague if the meaning provided by its terminology and syntax is not sufficiently understandable to the average person so as to inform him of his rights and duties under the law. Medrano v. Allee, 347 F.Supp. 605, 621 (S.D. Tex. 1972), modified 416 U.S. 802 (1974).

Plaintiff does not dispute the Navy's finding of his homosexuality following his admission thereof, and there is no real question about his knowledge and understanding of what activity constituted homosexual conduct within the proscription of the Navy's regulations. Under these circumstances the plaintiff lacks standing to challenge the application of the Navy's regulation to the hypothetical conduct of others, since he is well within its prohibitions. See Parker v. Levy, 417 U.S.

733, 756 (1974); Broadrick v. Oklahoma, 413 U.S. 601, 608 (1973); Walker v. Dillard, 523 F.2d 3, 5n.6 (4th Cir. 1975); Big Eagle v. Andera, 508 F.2d 1293, 1297 (8th Cir. 1975); Glines v. Wade, 401 F.Supp. 128, 131n.5 (N.D. Ca. 1975).

A second but related doctrine is that of overbreadth. A statute will be deemed overbroad if it sweeps too far and includes constitutionally protected conduct within its prohibition. See Grayned v. City of Rockford, supra at 114. Under certain circumstances a plaintiff may raise the overbreadth challenge without demonstrating that his own conduct in issue and within the proscription of the statute could not constitutionally be regulated by a statute more narrowly drawn. See Grayned v. City of Rockford, supra; Dombrowski v. Pfister, 380 U.S. 479, 486 (1965); United States v.

Dellinger, 472 F.2d 340, 356 (7th Cir. 1972), cert. den., 410 U.S. 970 (1973).

Under the facts of this case, however, plaintiff's claim of overbreadth must fall. In Parker v. Levy, supra, the Supreme Court upheld certain provisions of the Uniform Code of Military Justice for the violation of which Levy had been convicted by court martial. The Supreme Court rejected Levy's attack on the provions for vagueness, and concluded in pertinent part on his challenge for overbreadth:

> While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections. The fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constituionally impermissible outside it. 417 U.S. at 758.

* * * * * *

> In the First Amendment context, attacks have been permitted on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity. Dombrowski v. Pfister, 380 U.S. 479, 486 (1965). Id. at 759.
>
> This Court has, however, repeatedly expressed its reluctance to strike down a statute on its face where there were a substantial number of situations to which it might be validly applied. Id. at 760.

Here, too, we deal with conduct rather than speech, and plaintiff does not maintain that there is not a wide range of conduct which is properly proscribed by the Navy's regulation on homosexuality.

In addition, recent case law has reemphasized the special domain of the military and the fact that military exigencies may require regulation different from that tolerated in the civilian sphere. E.g.,

Greer v. Spock, ____U.S.____, 44 U.S. Law Week 4380 (March 24, 1976); Middendorf v. Henry, ____U.S.____, 44 U.S. Law Week 4401 (March 24, 1976).

This court's conclusion that plaintiff has failed to demonstrate a strong likelihood of eventual success on the merits of his claim is not intended to laud the Navy's regulations or conduct with respect to those found to have engaged in homosexual conduct.

The Navy evidently shares the view taken by at least one court that ". . . the factors of emotional instability and possible subjection to sinister pressures and influences. . . have traditionally been the lot of homosexuals . . . ." Adams v. Laird, 420 F.2d 230, 239 (D.C. Cir. 1969), cert. den., 397 U.S. 1039 (1970).

But there is real question as to the empirical basis for the belief that those

who have engaged in homosexual conduct are unduly subject to "sinister pressures and influences." See Comment, "The Homosexual's Legal Dilemma," 27 Ark. L. Rev. 687, 703-704 (1973); Comment, "Homosexuals in the Military," 37 Fordham L. Rev. 465, 473 (1969). If this court can accept the results of the Kinsey Study, as cited in Norton v. Macy, 417 F.2d 1161, 1167n.28 (D.C. Cir. 1969), then it may be safely assumed that large numbers of men who have been or are now in the military have engaged in proscribed homosexual conduct, yet there is no evidence that a disproportionate number of those members found to be disloyal or inefficient were also found to have engaged in homosexual conduct.

Indeed, if the Navy is serious about minimizing security and reliability risks, it would more logically encourage those

who have fallen afoul of its regulations on homosexuality to admit that fact without fear or discharge or other reprisal.

It is difficult to evaluate how well-founded is the Navy's view that those who engage in homosexual conduct are more susceptible to blackmail for that reason. It would seem more reasonable to believe that if, as the Navy posits, the great majority of its members are heterosexual, then there is a graver danger of blackmail from illicit heterosexual than from homosexual liasons.

The Navy would do well to re-evaluate its stance regarding homosexual conduct in the same manner that other governmental concerns have. See, e.g., Singer v. United States Civil Service Commission, ____F.2d ____(9th Cir. January 12, 1976) (noting changes in attitude by Civil Service

Commission towards homosexuality); Norton v. Macy, supra; Society for Individual Rights, Inc. v. Hampton, 63 F.R.D. 399 (N.D. Ca. 1973). The emerging learning of these cases--and of current psychiatric thought--is that there is no basis for homosexuality or homosexual conduct per se disqualifying one from positions of trust and responsibility; rather, the inquiry should be as to one's fitness for his position without regard to his sexual orientation.

The Navy does itself and the public little good by removing an experienced and able serviceman such as plaintiff from its ranks, and it should seriously consider what interest is furthered by its decision to do so.

Conclusion

For the foregoing reasons, plaintiff's motion for a preliminary injuction is hereby denied. It is so ordered.

Dated: April 14, 1976

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AGI DENNIS R. BELLER, Plaintiff, v. THE HONORABLE J. WILLIAM MIDDENDORF, Secretary of the Navy; CAPTAIN C. R. WARD, Commanding Officer, Fleet Numerical Weather Central, Monterey, California, Defendants.	Civil No. 75-2747 GBH

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter arises from a complaint filed herein on December 29, 1975 by which plaintiff challenged the Navy's decision to administratively discharge him for unfitness because of homosexual conduct. The complaint alleged jurisdiction under

28 U.S.C. §§1331 and 1361 and under 5 U.S.C. §552(a) [sic]. The complaint further alleged that defendants' conduct amounted to a breach of plaintiff's enlistment contract; that the decision to discharge plaintiff was violative of his rights to privacy and substantive due process; and that he was entitled to an injunction against his separation, a declaration of rights under his enlistment contract, and damages for violation of the Privacy Act.

Upon motion by the plaintiff, this court granted a temporrary restraining order and issued an order to show cause why a preliminary injunction should not issue.

Following the submission of briefs by the parties and oral argument on the matter, the court denied plaintiff's

motion for a preliminary injunction in its MEMORANDUM OF DECISION filed on April 15, 1976. The court expressed serious doubt about the wisdom of the Navy's policy concerning homosexuality, but concluded that plaintiff was not entitled to a preliminary injunction because he had failed to demonstrate irreparable injury or a reasonable likelihood of success on the merits within the teaching of the pertinent cases.

Defendants have now moved for summary judgment on the same issues which were the subject of this court's analysis in its MEMORANDUM OF DECISION.

I. Breach of Plaintiff's Enlistment Contract

Plaintiff's first claim for relief rests on the allegation that the Navy's

decision to discharge him was a breach of his contract of enlistment. There are no factual disputes on this issue, and as a matter of law plaintiff's claim must fail. See MEMORANDUM OF DECISION at 18.

II. Violation of Plaintiff's Right to Due Process

Plaintiff's second claim is that the Navy's definition of prescribed homosexual conduct in SECNAVINST 1900.9A is violative of his rights to substantive due process.

On pages 19-22 of its MEMORANDUM OF DECISION, the court discussed and rejected plaintiff's contention that SECNAVINST 1900.9A was either unconstitutionally vague or overbroad or both. Plaintiff's constitutional attack on this regulation is further undercut by the Supreme Court's recent decision in Doe v. Commonwealth's Attorney, 425

U.S. 901 (1976), affirming 403 F.Supp. 1199 (E.D. Va. 1975).

III. Damages under the Privacy Act

Plaintiff's final contention is that he is entitled to damages under the Privacy Act, 5 U.S.C. §552a. As defendants point out, however, subsection (b) thereof provides:

> (b) Conditions of Disclosure.-- No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior consent of, the individual to whom the record pertains, unless disclosure of the record would be--
>
> (a) to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties.

The information which was passed intra-agency in this case clearly falls within the "need to know" exception contained in 5 U.S.C.

§552a(b)(1). See 40 Federal Register 37570 (1975) for proposed 32 C.F.R. §701.107, the implementating regulation for this exception with respect to the Department of the Navy. Certainly plaintiff's commanding officer had a "need to know" that plaintiff had admitted to conduct which served as a basis for discharge due to unfitness under Navy regulations.

Accordingly, the motion of defendants for summary judgment in their favor is hereby granted. It is so ordered.

Dated: December 3, 1976

United States District Judge

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

AGI DENNIS R. BELLER	
vs.	Civil Action File No. C75-2747 GBH
THE HONORABLE J. WILLIAM MIDDENDORF, etc., et al	JUDGMENT

This action came on for hearing before the Court, Honorable George B. Harris, United States District Judge, presiding, and the issues having been duly heard and a decision having been rendered,

It is Ordered and Adjudged that the motion of defendants for summary judgment in their favor is hereby granted.

Dated at San Francisco, California, this

3rd day of December, 1976.

William L. Whittaker
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AG1 DENNIS R. BELLER, Plaintiff-Appellant, v. THE HONORABLE J. WILLIAM MIDDENDORF, Secretary of the Navy, et al., Defendants-Appellees.	)	No. 77-1354
JAMES LEE MILLER, Plaintiff-Appellant, v. DONALD H. RUMSFELD, Secretary of Defense, et al. Defendants-Appellees.	)	No. 77-1671
MARY ROSEANN SAAL, Plaintiff-Appellee, v. J. WILLIAM MIDDENDORF, Secretary of the United States Navy, in his official	)	No. 77-2461 OPINION

capacity,)
)
Defendant Appellant.)
)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Submitted 11/8/78

Before: BROWNING and KENNEDY, Circuit Judges, and CHRISTENSEN,* District Judge.

Kennedy, Circuit Judge:

Although the factual and procedural settings of these three consolidated appeals differ, the broad outlines are similar: an enlisted person in the Navy, with an otherwise fine performance record, admitted engaging in homosexual acts, conduct prohibited by Navy regulations. Following proceedings before an adminis-

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* Honorable A. Sherman Christensen, Senior United States District Judge for the District of Utah, sitting by designation.

trative discharge board and review by the Secretary of the Navy, each was ordered discharged. Plaintiffs raise constitutional challenges to the Navy's regulations and proceedings. We recognize that to many persons the regulations may seem unwise, but if that be the case the political branches of the Government, which most certainly are on notice of the controversy here or in similar cases, have the right and the prerogative to declare a different policy. Our role is more confined. We are limited to determining whether or not the Constitution prohibits the Navy from adopting the rule before us. We cannot say that constitutional limitations have been exceeded here, and therefore we do not find the regulation is invalid.

We first state the relevant facts of

each case, relying extensively on the respective district court opinions.

I.

Saal

Plaintiff Mary Saal enlisted in the United States Navy on December 17, 1971. Following training she was assigned as an air traffic controller at Alameda Naval Air Station. In January 1972 she entered into a three-year enlistment contract. In March 1973, after an investigation by the Navy into plaintiff's activities, she signed a statement admitting homosexual relations with another Navy member assigned to the Air Operations Department. Thereafter, administrative proceedings to separate plaintiff were instituted pursuant to Navy regulations. An administrative discharge board was convened on July 6, 1973, and, after a hearing, it

recommended on the basis of plaintiff's admitted homosexual activity that she should be separated from the service with a general discharge. At the hearing Saal admitted to having had homosexual relations since her March statement and indicated that she intended to continue her homosexual relationship.

This action was filed on July 27, 1973, seeking injunctive relief to prevent the Navy from discharging plaintiff for her homosexual activity as well as damages for back pay and lost promotional opportunities. In August 1973, the district court granted preliminary injunctive relief staying the discharge pending a decision on the merits. In November 1973, the Chief of Naval Personnel notified plaintiff that he had directed her separation with a general discharge, although the discharge

remained stayed by court order. In January 1974, defendant moved for summary judgment contending that (1) plaintiff had failed to exhaust her administrative remedies, (2) the administrative hearing accorded plaintiff satisfied due process, and (3) the discharge was lawful. On July 10, 1974, the district court denied the motion, rejecting the first contention and holding that the other two contentions were not ripe for disposition by summary judgment.

With the term of her enlistment contract nearing its end, plaintiff in September 1974 submitted a written request for extension to her commanding officer in accordance with Navy regulations. The commanding officer, aware of the pending litigation and not wanting to take action which might affect

it, forwarded the request without recommendation to the Chief of Naval Personnel, the final authority in such matters, and asked for advice. On December 12, 1974, the Chief of Naval Personnel replied by denying plaintiff's request for extension and ordering her separation with an honorable discharge upon expiration of her enlistment. The prior directive ordering her discharge by reason of unfitness was cancelled and her discharge was "characterized as warranted by the average performance evaluation marks which have been earned during her period of service." At the same time, plaintiff was assigned a reenlistment code of RE-4, which designates a person as ineligible for reenlistment.

Plaintiff's enlistment expired on January 6, 1975. Defendant immediately moved to dismiss this action as moot.

By order dated August 19, 1975, the district court granted the motion, lifted the prior stay order (thereby permitting issuance of an honorable discharge to plaintiff), but gave plaintiff leave to file an amended complaint. On August 22, 1975, plaintiff was discharged from the Navy. On September 15, 1975, she filed her first amended complaint in which she contended she was deprived of due process by reason of having been rendered ineligible for reenlistment under Instruction 1900.9A. In the amended complaint plaintiff sought declaratory, injunctive, and monetary relief. The district court granted partial summary judgment for Saal, holding due process requires that plaintiff's application for extension of service or reenlistment receive the same consideration as that of other Navy

personnel similarly situated without reference to policies or regulations substantially mandating exclusion or processing for discharge of persons who engage in homosexual activity. Saal v. Middendorf, 427 F. Supp. 192 (N.D. Cal. 1977).

Miller

Plaintiff James Miller, currently a Yeoman Second Class, enlisted in the Navy in February 1965. He had reenlisted twice, the most recent reenlistment being in 1972 for a period of six years. As a result of an unrelated incident, a Naval Investigative Service (NIS) inquiry began in 1975, and in an interview with the NIS investigator, after being advised of his rights, plaintiff admitted that he had participated recently in homosexual acts with two Taiwanese natives while he was

stationed in Taiwan. Pursuant to orders issued prior to the institution of the NIS investigation, plaintiff was transferred to the USS ORISKANY at Alameda, California. He served on board for over one year and was given a Secret clearance by his commander, who had knowledge of the NIS investigation.

On April 12, 1976, a hearing board was convened to consider Miller's discharge for homosexuality. The board heard testimony from the NIS investigator, several witnesses as to Miller's good character and service in the Navy, and Miller on his own behalf. It found that plaintiff had admitted to committing homosexual acts during his assignment in Taiwan, but nevertheless recommended, by vote of two to one, that plaintiff be retained in the Navy. The dissenting mem-

ber of the board voted that plaintiff be administratively discharged under honorable conditions.

Plaintiff was subsequently examined by the Senior Medical Officer who found that despite plaintiff's admitted homosexual episodes, he did not appear to be "a homosexual," and that he found no evidence of psychosis or neurosis. The medical officer recommended retention. The convening authority, the Commanding Officer of the USS ORISKANY, then forwarded the board proceedings to the Chief of Naval Personnel and recommended that plaintiff be retained in the Navy.

The Assistant Director of the Enlisted Performance Division recommended that plaintiff be separated with a General Discharge under honorable conditions by reason of misconduct, for his admitted participation in in-service homosexual

acts. That recommendation was approved by the Assistant Secretary of the Navy and plaintiff was then scheduled for separation on June 23, 1976.

On that date, Miller brought suit in the district court, asking that his discharge be restrained and in the alternative that he be given not less than an honorable discharge. The Chief of Naval Personnel subsequently ordered Miller separated with an honorable discharge, but this discharge was stayed by the district court until, relying largely on its decision in Beller, it granted summary judgment for the Navy. This court, however, stayed Miller's discharge pending disposition of this appeal. Miller has been retained in the Navy pursuant to this court's order. He currently works for the Commanding Offi-

cer, Enlisted Personnel, Treasure Island. His commanding officer there requested that the Navy retain him.

Miller has tried to reenlist; the Navy denied his application.

Beller

Plaintiff Dennis Beller enlisted in the United States Navy in 1960. On August 29, 1972 he reenlisted for a six-year term. In the latter part of 1975 plaintiff was informed that the Navy desired to upgrade his security clearance to permit him access to "Top Secret" information. During the course of a routine background investigation of plaintiff, Navy personnel discovered that plaintiff had had contacts with homosexual groups since entering the Navy.

This information was forwarded to the

Naval Investigative Service. Plaintiff provided investigators a sworn statement which recited in pertinent part:

> Regarding my sexual activities I first engaged in sexual activity with males after my enlistment in the Navy. Since that time I have engaged in sex with males. I would not like to name any people that I have been engaged with. I have and do beliv [sic] myself to be bi-sexual. I have been President of the Monterey Dons Motorcycle Club for 2 years. I have been in the Gilded Cage, Rightous [sic] Ram, known to be gay bars.

An administrative discharge board was thereupon convened to consider plaintiff's possible administrative discharge by reason of unfitness. The board recommended an honorable discharge based upon unfitness. This recommendation was forwarded to the Chief of Naval Personnel, who ordered plaintiff discharged on December 18, 1975. Beller brought suit in the district court, seeking an injunction

preventing the Navy from involuntarily discharging him, an injunction directing the Navy to expunge from service records and all other files maintained on Beller any reference to the administrative board or his separation from the Navy as a homosexual, declaratory relief to the effect that he is serving under a valid enlistment contract, and damages for violation of the Privacy Act. The district court granted a temporary restraining order preventing discharge, but eventually it denied plaintiff's motion for a preliminary injunction and entered judgment for the Navy. The Navy then separated Beller with an honorable discharge based upon unfitness. Since discharge, Beller has remained a civilian. He has not applied for reenlistment.

The delays inherent in securing appel-

late review, and the shifting, at times seemingly inconsistent, position of the Navy with regard to several issues in this case, have combined to produce several difficult threshold issues. We address these issues in the context of Saal's case and then apply our analysis to Beller and Miller.

Saal

A. Subject Matter Jurisdiction

1. The District Court's Opinion

In its motion for summary judgment, the Navy argued that the district court lacked jurisdiction because the amount in controversy did not exceed $10,000. In the alternative, the Navy contended that if the damages sought by Saal did exceed $10,000, the Court of Claims had exclusive jurisdiction. See 28 U.S.C.

§ 1491.

The district court held Saal had alleged with sufficient certainty that the amount in controversy exceeded $10,000. It also held that it had jurisdiction over all of her various claims for relief under 28 U.S.C. § 1331, since "plaintiff's claim arises under the Fifth Amendment of the Constitution." The court noted that Davis v. Passman, 544 F.2d 865 (5th Cir. 1977), and Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), supported a right of action for damages under the fifth amendment and were "authority for the existence of jurisdiction here." 427 F. Supp. at 196 n.2.[1] In granting partial summary judgment for Saal, however, the court addressed itself only to Saal's requests for declaratory and injunctive relief. See 427 F. Supp. at 203.

It stated, "The present record does not permit disposition of [Saal's] claim for damages and other relief." Id. at 195.

2. The Jurisdictional Amount Requirement

The congressional abolition of the jurisdictional amount requirement for suits brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity applies to this case.[2] Therefore, it is not essential to the district court's jurisdiction under 28 U.S.C. § 1331 that the amount in controversy exceed $10,000. Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 607-08 n.6 (1978). See also National Treasury Employees Union v. Campbell, 589 F.2d 699, 677 & n.19 (D.C. Cir. 1978) and cases cited therein. Although it is unnecessary for us to address the issue fully, mandamus jurisdiction

might also be appropriate in these cases, see benShalom v. Secretary of the Army, No. 78-C-431, slip op. at 3-4 (E.D. Wis. May 20, 1980) and cases cited therein.

3. Sovereign Immunity

As the court said in Neal v. Secretary of the Navy, 472 F. Supp. 763, 770 (E.D. Pa. 1979), "[t]he legal principles which define the contours of the doctrine of sovereign immunity are far from clear." In general, "[t]he United States, as sovereign, is immune from suit save as it consents to be sued, and the terms of consent to be sued in any court define that court's jurisdiction to entertain the suit." United States v. Sherwood, 312 U.S. 584, 586 (1941). See also United States v. Testan, 424 U.S. 392 (1976). Unless sovereign immunity has been waived or does not apply, it bars equitable as

well as legal remedies against the United States. Jaffee v. United States, 592 F.2d 712, 717 n.10 (3d Cir. 1979), citing Malone v. Bowdoin, 369 U.S. 643 (1962); Midwest Growers Co-op Corp. v. Kirkemo, 533 F.2d 455, 465 (9th Cir. 1976). See generally K. Davis, Administrative Law Treatise Ch. 27 (1958 & Supps. 1970); K. Davis, Administrative Law of the Seventies Ch. 27 (1976 & Supp. 1980); 1 Moore's Federal Practice ¶ 0.65[2.-1 to 2.-3](2d ed. 1979); C. Wright, A. Miller & E. Cooper, Federal Practice & Procedure § 3655 (1976).

Saal's suit is against defendant Middendorf in his official capacity.[3] We must first determine whether sovereign immunity bars Saal's claims for equitable relief.

In Glines v. Wade, 586 F.2d 675 (9th Cir. 1978), rev'd on other grounds sub

nom. Brown v. Glines, 48 U.S.L.W. 4095 (January 21, 1980), plaintiff Glines, a Captain in the Air Force Reserves on active duty, violated a regulation requiring him to obtain approval from his commander before circulating petitions on Air Force bases. As a result of his unauthorized activities, Glines was removed from active duty and reassigned to the standby reserves, with adverse financial consequences. This court concluded the regulations violated Glines' first amendment rights. It then held that "the district court was correct in declaring the regulations void, enjoining their enforcement, and ordering Glines reinstated in a status that is consistent with his status before he was relieved from active duty." 586 F.2d at 681. The court held that sovereign immunity

did not bar the district court from awarding this nonmonetary relief:

> [In] actions claiming that a government official acted in violation of the Constitution or of statutory authority . . . Congress has either waived sovereign immunity or the doctrine does not apply. 5 U.S.C. § 702; Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682, 689-91 (1949); Hill v. United States, 571 F.2d 1098, 1102 (9th Cir. 1978); 14 Wright, Miller, and Cooper, Federal Practice and Procedure § 3655 (Supp. 1977).

586 F.2d at 681.

The waiver of sovereign immunity found by the court was an amendment to the Administrative Procedure Act. The amendment provided in part:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States

is an indispensable party.

5 U.S.C. § 702. In Hill v. United States, 571 F.2d 1098 (9th Cir. 1978), an action brought in the district court under the Tucker Act, 28 U.S.C. § 1346(a), this court held that the waiver of sovereign immunity expressed in section 702 applied retroactively to actions brought in the district court under 28 U.S.C. § 1346(a). We construe the decisions in Glines and Hill as holding that section 702 waives sovereign immunity for Saal's action brought under 28 U.S.C. § 1331 seeking nonmonetary relief for violation of her fifth amendment rights. We recognize the division of authority on the question whether and under what circumstances section 702 waives sovereign immunity in actions brought under 28 U.S.C. § 1331. Compare, e.g., Jaffee v. United States,

supra, and Neal, supra (waiver) with Estate of Watson v. Blumenthal, 586 F.2d 925 (2d Cir. 1978) and Sharrock v. Harris, 473 F.Supp. 1173 (S.D.N.Y. 1979)(no waiver). See also National Treasury Employees Union, supra, 589 F.2d at 673 N.7 (waiver)(dicta). Employees Union, supra, 589 F.2d at 673 n.7 (waiver)(dicta). Although the Glines decision admittedly did not address the sovereign immunity issue in as much detail as the courts in Jaffee or Watson, we think it states the controlling law of this circuit. We therefore affirm the district court's determination that it had jurisdiction over Saal's claims for nonmonetary relief under 28 U.S.C. § 1331.

Our conclusion is consistent with Lee v. Blumenthal, 588 F.2d 1281 (9th Cir. 1979), where the plaintiff sought a

writ of mandamus to compel the Secretary of the Treasury to redeem certain bonds controlled by the Second Liberty Bond Act. 31 U.S.C. §§ 752, 754(b). The court viewed the plaintiff's lawsuit as essentially one for money damages arising from a contract dispute and concluded that the Court of Claims had exclusive jurisdiction over the action since a judgment over $10,000 was sought. See also Watson, supra. The court's brief discussion of 5 U.S.C. § 702 and Hill, supra, is best understood as recognizing that section 702 was not intended to disturb the existing limitations on district court jurisdiction imposed by the Tucker Act. We do not interpret Lee to hold that section 702 was not a waiver of sovereign immunity in actions properly brought under section 1331.

In light of our holding, we find it unnecessary to address whether the language in Glines and Larson, stating that sovereign immunity does not apply where the plaintiff claims "that a government official acted in violation of the Constitution," 586 F.2d at 681, would provide an alternate grounds, independent of 5 U.S.C. § 702, for finding sovereign immunity inapplicable to Saal's nonmonetary claims.[4] At least one commentator has viewed the decisions in this area as hopelessly inconsistent, see K. Davis, Administrative Law Treatise Ch. 27 (1958 & Supps. 1970); K. Davis, Administrative Law of the Seventies Ch. 27 (1976 & Supp. 1980), and we decline to attempt a reconciliation here.

As we noted before, the district court granted summary judgment only on Saal's

claims for nonmonetary relief. There may be several difficult issues with regard to whether sovereign immunity bars Saal's claims for monetary relief. Since that aspect of her case is not before us, however, we do not resolve them on this appeal.[5]

Beller

Plaintiff Beller also sued Middendorf and his codefendants in their official capacities. Like Saal, Beller alleged that the amount in controversy exceeded $10,000 and that jurisdiction was proper under 28 U.S.C. § 1331. He also claimed the district court had mandamus jurisdiction, 28 U.S.C. § 1361. Beller requested damages only with regard to his action brought under the Privacy Act, 5 U.S.C. § 552a. The district court granted summary judgment to the Navy on this claim,

and we affirm.[6]

Beller requested an injunction prohibiting the defendants from discharging him in violation of his statutory and constitutional rights and also an order directing defendants to expunge from his service records and all other files any reference to his administrative board proceedings or separation from the Navy as a homosexual. The congressional waiver of sovereign immunity in these circumstances, see pp. 10-11 supra, is sufficient to give the federal courts jurisdiction over Beller's claims for nonmonetary relief.

In the district court the Navy argued that the court had no jurisdiction because plaintiff's action was merely one for breach of his enlistment agreement, and jurisdiction lay exclusively in the

Court of Claims since the claims exceeded $10,000. The court rejected this argument, holding that the "primary relief" sought by Beller was nonmonetary. We can assume arguendo that a district court does not lose jurisdiction over a claim for nonmonetary relief simply because it may later be the basis for a money judgment. See, e.g., Melvin v. Laird, 365 F. Supp. 511 (E.D.N.Y. 1973). This does not necessarily mean that a district court has jurisdiction over a back pay claim in excess of $10,000 if the court finds the relief sought is "essentially" or "primarily" nonmonetary, and we doubt that cases such as Mathis v. Laird, 483 F.2d 943 (9th Cir. 1973), stand for such a principle. Cf. Glines, supra. Beller, however, did not seek back pay charges in excess of $10,000 for viola-

tion of his enlistment agreement. We think Glines v. Wade controls our disposition of this issue and requires a holding that the Court of Claims does not have exclusive jurisdiction over the nonmonetary claims of Beller, Saal, and Miller. The cases before us more closely resemble Glines than Denton v. Schlesinger 605 F.2d 484 (9th Cir. 1979), where the plaintiffs sought $350,000 damages and full reinstatement because their termination from the military allegedly violated their contract, statutory, and constitutional rights. Beller did not seek damages, and the grounds which the court in Denton gave for finding Glines distinguishable, see id. at 486 n.4, apply equally to this case.

Miller

Miller's action was also brought pur-

suant to 28 U.S.C. § 1331 and 28 U.S.C. § 1361. In the proceedings below Miller did not seek damages or back pay (possibly because he has been retained in the Navy pursuant to this court's order), and his complaint did not request declaratory relief. Miller did, however, seek an injunction "restraining respondents from discharging petitioner from the United States Navy, or awarding him a less than Honorable Discharge." In light of what we have already said above and the possibility of awarding meaningful injunctive relief, which we discuss below, we conclude the district court had jurisdiction pursuant to section 1331 of Miller's action.

B. Mootness

In all three appeals the Navy contends there is no case or controversy and that the suits should be dismissed as moot.

Its argument is essentially this: (a) the enlistment terms of all three plaintiffs has expired; (b) neither Saal nor Beller have applied for reenlistment after being discharged; (c) even if they, like Miller, had applied for reenlistment, the district court cannot order the Navy to accept those reenlistment applications; (d) thus, even assuming the discharge proceedings were invalid for some reason, the district courts at this point are unable to provide a remedy and any adjudication regarding the Navy's reasons for refusing to permit Saal and Beller to reenlist would be premature; and (e) thus, there is no controversy capable of being decided by the courts. We disagree with the Navy. Although the facts in each of the appeals before us differ, with regard to mootness we conclude they are sufficient-

ly similar so that separate consideration is unnecessary.

For purposes of determining whether this appeal is moot, we note that the plaintiffs probably have a damages claim under the Tucker Act for less than $10,000 which they could maintain in the district court, see VanderMolen v. Stetson, 571 F.2d 617 (D.C. Cir. 1977), even if those claims were ultimiately determined to be without merit. In light of our holding below that the Navy did not act unconstitutionally in discharging these plaintiffs, no point would be served by permitting plaintiffs to amend their complaints. In passing on mootness, however, we consider the case as if such claims had been pled in the district court. When so considered, this appeal is not moot. See Memphis

Light, Gas & Water Division v. Craft, 436 U.S. 1, 8-9 (1978); Bituminous Coal Operators' Assoc., Inc. v. U.M.W., 585 F.2d 586, 599 (3d Cir. 1978).

Even if the district courts have no jurisdiction over any damages actions by these plaintiffs, we still conclude that their requests for nonmonetary relief are not moot. As a result of regulations and procedures challenged as constitutionally infirm, the plaintiffs claim they were injured in various ways: for example, they were subject to stigma as being unfit for military service, allegedly without a hearing on this question; they were given a reenlistment code which prevented them from continuing employment in the military; and the discharge and accompanying materials in their personnel records may injure their employment

prospects. These injuries, if proven, are of a continuing nature; they did not expire with plaintiffs' term of enlistment. In a somewhat analogous context, this circuit has held that the possibility of being recalled to active duty, even when there is no evidence of imminent recall, is sufficient to prevent an action challenging the military's refusal to discharge the plaintiff as a conscientious objector from being moot. Taylor v. Claytor, 601 F.2d 1102 (9th Cir. 1979); Bratcher v. McNamara, 448 F.2d 222 (9th Cir. 1971). The possible continuing injuries noted above are, we think, sufficient to justify our conclusion that a live case or controversy exists in all three appeals.[7] See also Brown v. Board of Bar Examiners, No. CA 79-4529, slip op. at 4227-28 (9th Cir. July 18, 1980)(appellate review of order

requiring that applicant be permitted to take bar examination cannot practically be obtained before the exam; therefore, case not moot). Cf. Berg v. Claytor, 591 F.2d 849 (D.C. Cir. 1978); Matlovich v. Secretary of the Air Force, 591 F.2d 852 (D.C. Cir. 1978)(jurisdiction asserted over claims similar to plaintiffs here).

We reject the Navy's argument that no declaratory or injunctive relief capable of being granted by the courts would be responsive to the constitutional violations alleged by the plaintiffs. We are aware of the principle that the military cannot be forced to accept a reenlistment application, O'Callahan v. United States, 451 F.2d 1390 (Ct. Cl. 1971). Even if correct, however, this doctrine does not foreclose various other kinds of injunctive or declaratory relief discussed above

and by the district courts in these cases.

C. Exhaustion of Administrative Remedies

The Navy maintains that Saal's and Beller's complaints should have been dismissed because they failed to exhaust administrative remedies. Saal and Beller, say the Navy, should have applied for reenlistment and upon rejection sought review before the Board for Correction of Naval Records (BCNR). See 10 U.S.C. § 1552; 32 C.F.R. § 723. The principal authority relied upon by the Navy is Champagne v. Schlesinger, 506 F.2d 979 (7th Cir. 1974), where the court required an enlisted person discharged under Instruction 1900.9A for homosexuality to seek review before the BCNR before challenging the constitutionality of his discharge in a district court. The court

interpreted the relevant regulations to allow the BCNR to consider the validity of plaintiffs' discharges and to recommend to the Secretary of the Navy appropriate relief, including reinstatement and back pay.

Our focus in this case is on the constitutionality of the Navy's actions in discharging the plaintiffs, not the constitutionality of Navy regulations prohibiting acceptance of enlistment applications from homosexuals. The Navy's arguments regarding the prematurity of the plaintiffs' challenges to those practices are therefore inapposite. Even if the Navy's reenlistment practices were before us, the record makes it plain that any reenlistment application by Saal and Beller would be completely futile.

There is some tension between the

holding in Champagne and this circuit's decision in Glines v. Wade, supra, and Downen v. Warner, 481 F.2d 642 (9th Cir. 1973), which hold exhaustion of BCNR remedies unnecessary before challenging regulations principally on constitutional grounds. Our own precedents control. In any event, our interpretation of the applicable Navy policies differs from that in Champagne. We understand Navy policy to require discharge of members who have engaged in homosexual conduct, subject only to a power of discretionary retention vested in the Secretary which is unrelated to the BCNR's function. In light of our understanding, it would serve no purpose for the plaintiffs to pursue such administrative remedies. Cf. Weinberger v. Salfi, 422 U.S. 749, 765 (1975); Johnson v. Robison, 415 U.S. 361 (1974)

(suggesting that administrative agency may not pass upon constitutional challenges to statutes).

III

The due process questions presented by the actions of the Navy are both sensitive and complex. We must consider interrelated issues of procedural due process, substantive due process, and to a lesser extent what one commentator has labeled "structural due process," see Tribe, Structural Due Process, 10 Harv. C.R.-C.L. L. Rev. 269 (1975), and equal protection.[8]

A. The Navy's Policy Regarding Discharge of Homosexuals

To evaluate the constitutionality of the Navy's conduct, it is necessary to determine what the Navy's policy regarding discharge of homosexuals really is. The

policy of the Secretary which was applied to the plaintiffs begins: "Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization . . . . Their prompt separation is essential." Inst. 1900.9A. We conclude that this instruction and the applicable regulations make discharge of known homosexuals mandatory, subject only to a kind of executive discretion vested in the Secretary which is unrelated to the fitness of any particular individual.[9]

Since 1974, in Champagne v. Schlesinger, supra, the Navy in litigation has maintained that its regulations do not require discharge of all homosexuals. It claims that the regulations, which are quoted at length below, require that homosexuals only be processed for discharge; the dis-

charge board can recommend retention, and the Secretary has discretion to retain a known homosexual where he considers it appropriate.

In Berg v. Claytor, supra, the Court of Appeals for the District of Columbia accepted the Navy's explanation of its policy but remanded the case to the Secretary for a fuller explanation of why the Secretary decided not to retain the plaintiff. Cf. also Gayer v. Schlesinger, 490 F.2d 740 (D.C. Cir. 1973) (interpreting security clearance regulations). With all respect, we cannot agree with that court's view of the applicable regulations.

The Secretary's policy regarding homosexuals states:

> Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization. In devel-

> oping and documenting cases involving homosexual conduct, commanding officers should be keenly aware that members involved in homosexual acts are security and reliability risks who discredit themselves and the naval service by their homosexual conduct. Their prompt separation is essential.

SECNAVINST 1900.9A. The Navy's Personnel Manual prescribes several grounds on which enlisted persons "may be separated by reason by misconduct." BUPERSMAN § 3420185. Homosexual acts, various sexual offenses, and sale or trafficking in drugs are the only categories where the regulations provide, "Processing for discharge is mandatory." The regulations governing other grounds for discharge by reason of misconduct permit various ways for a member to rehabilitate himself or to demonstrate that because of other reasons he should be retained.[10] The regulations also provide that members may

be discharged by reason of unfitness on similar grounds, and the plaintiffs here were discharged under the unfitness regulations. Homosexual acts (and conduct labelled "sexual perversion") are singled out with the directive, "Processing for discharge is mandatory," while some form of individual consideration or rehabilitation is provided for in connection with other grounds.[11] The category for homosexual acts explicitly refers to INST. 1900.9 as an expression of the controlling policy.

The district courts in Saal and Martinez v. Brown, 449 F. Supp. 207 (N.D. Cal. 1978), concluded the regulations required discharge of a person found to be homosexual. Both courts noted that the Navy was given the opportunity to demonstrate that it retains some

known homosexuals and to articulate the factors which influence the Secretary's decision in such cases. The Secretary in these cases was either unable or unwilling to do so.[12] Other indications in the records of the cases before us support the conclusion that "as applied, the regulations require the mandatory discharge of those found to be homosexuals or to have engaged in homosexual conduct." Martinez, supra, 449 F. Supp. at 212.[13]

We can agree with the Navy that one kind of discretion is permitted by the regulations. The Secretary urges that he has broad discretion to retain a homosexual if the individual is of extraordinary value to the Navy. One explanation proferred by the Secretary in Beller suggests that the fitness of the individual to serve and the likelihood that retaining

the individual will impair the efficiency of the service are considered by the Secretary. In his brief, the Secretary states:

> [T]he decision of whether or not to discharge or retain a serviceman involves a high degree of military discretion and judgment. The decision is based on a balance that only the military can strike, and the individuality of each decision makes guidelines impossible. What must be weighed is the need of the service for the specific attributes and talents that the particular serviceman possesses and the effect on the military of the loss of the services of that individual, against the actual or probable detriment that retention of the individual would have upon the military in general, and the effectiveness of the individual in particular.

As developed further in this and other cases, however, see, e.g., Berg, supra, 436 F. Supp. at 81, 591 F.2d at 850-51; Matlovich, supra, 591 F.2d at 856-61, an individual with an otherwise fine service record will not be retained unless the

Secretary concludes his record marks him as being highly unusual or especially valuable to the Navy. This kind of consideration does not contemplate evaluating the fitness of an individual to continue military service.

For our purposes, therefore, the applicable Navy practices may be summarized as follows: the Secretary will discharge a person found by a discharge board to have engaged in homosexual acts covered by the regulations. The Secretary has discretion to retain a person in rare instances, but these instances are unrelated to the fitness to serve of the particular individual or the reasons why the Navy in general discharges homosexuals.[14]

B. Procedural Due Process

In determining whether the procedures followed by the Navy in processing the

plaintiffs for discharge violated the requirements of procedural due process, the threshold inquiry is whether the plaintiffs were deprived of an interest in property or liberty. Board of Regents v. Roth, 408 U.S. 564 (1972).

1. Property Interest

The discharge proceedings and ultimate separations did not deprive plaintiffs of a property interest without due process. The district court in Berg stated the reason succinctly:

> [U]nder Navy policy there can be no doubt that committing homosexual acts while in the Navy is cause for termination. Plaintiff has admitted to having performed homosexual acts while in the Service. Having admitted there was cause for dismissal, plaintiff's expectation of continued employment has been extinguished. Thus he had no property interest
> . . . .

436 F. Supp. at 81. The Navy regulations and practices create no reasonable expec-

tation of continued employment once a person is determined to fall within the categories described in the applicable regulations. See, e.g., Austin v. United States, 206 Ct. Cl. 719, 723 (Ct. Cl.), cert. denied, 423 U.S. 911 (1975); Neal v. Secretary of the Navy, supra, 472 F. Supp. at 781-85; Knehans v. Alexander, 566 F.2d 312, 314 (D.C. Cir. 1977), cert. denied, 435 U.S. 995 (1978). Cf. Tennessee v. Dunlap, 426 U.S. 312 (1976). Therefore, unless the Navy as a substantive matter may not discharge all homosexuals, or unless it must consider factors in addition to homosexuality in its decision, questions we discuss below, we see no basis for inferring any expectation of continued service sufficient to constitute a constitutional property interest. See generally Perry v. Sindermann, 408

U.S. 593 (1972). See also benShalom v. Secretary of the Army, supra, slip op. at 6-7. Cf. Wehner v. Levi, 562 F.2d 1276 (D.C. Cir. 1977).[15]

2. Liberty Interest

More difficult is the question whether the Navy's conduct deprived the plaintiffs of a protected liberty interest. The principles governing our analysis are contained in several leading cases, and we will not repeat them again. See, e.g., Codd v. Velger, 429 U.S. 624 (1977); Meachum v. Fano, 427 U.S. 216 (1976); Bishop v. Wood, 426 U.S. 341 (1976); Paul v. Davis, 424 U.S. 693 (1976) Roth, supra; Perry, supra. See also Graves v. Duganne, 581 F.2d 222 (9th Cir. 1978); Stretten v. Wadsworth Veterans Hospital, 537 F.2d 361 (9th Cir. 1976).

If the Navy's charges of homosexuality

were false, made public, and followed by discharge, we can assume a deprivation of liberty would occur. In such a case the Navy's action "might seriously damage [the person's] standing and associations in his community" and would impose "a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." Roth, supra, 408 U.S. at 573.

In the cases before us, however, the plaintiffs either admitted or were found in a predischarge hearing to have engaged in the acts which allegedly imposed a sigma on them. The plaintiffs were allowed to introduce evidence to support their arguments that the Secretary should exercise his discretion to retain them. Under the applicable regulations, there was nothing more about which to have a

hearing. Still putting aside the substantive questions whether the Navy may discharge all homosexuals or whether it must consider additional circumstances particular to the individual case, the reasoning of Codd v. Velger compels a conclusion that the plaintiffs' liberty interests were protected by the hearings they received. See also Graves v. Duganne, supra, 581 F.2d at 224 (9th Cir. 1978).

Plaintiffs contend also they received the stigma of "unfitness" for retention, and that they never received a hearing on the issue. In the context of these cases, we reject this argument. The mere fact of discharge from a government position does not deprive a person of a liberty interest. See, e.g., Roth, supra, 408 U.S. at 574 n.13, Ventetuolo v. Burke, 596 F.2d 476, 483 (1st Cir. 1979); Knehans

v. Alexander, supra, 566 F.2d at 314; Mazaleski v. Treusdell, 562 F.2d 701, 712-14 (D.C. Cir. 1977); Stretten, supra, 537 F.2d at 366; Lieberman v. Gant, 474 F. Supp. 848, 858 (D. Conn. 1979). The real stigma imposed by the Navy's action, moreover, is the charge of homosexuality, not the fact of discharge or some implied statement that the individual is not sufficiently needed to be retained. Cf. Tribe, supra, 10 Harv. C.R.-C.L. L.Rev. at 282-83 n.42. This is especially true since the regulations do not make fitness of the particular individual a factor in the decision to discharge.

The plaintiffs' admission of homosexual acts, and the fact that hearings on the subject were allowed, serve to dispose of the procedural due process claims. We note in addition that the deprivation of

liberty claims based on the fact that the reasons for discharge will become public seems to us without merit in any event. Albeit in apparent response to the initiation of litigation, plaintiffs were given an honorable discharge. The Navy contends that nowhere on the separation papers given to the plaintiffs is there any indication of the reasons for the honorable discharge. Assuming arguendo that a discharge under less than honorable conditions imposes a stigma, see Lunding, Judicial Review of Military Administrative Discharges, 83 Yale L.J. 33, 33-41 (1973), the fact of an honorable discharge on its face seems to impose no stigma on the recipient. Plaintiffs contend the permanent records on file with the Navy contain the reenlistment code RE-4 and the reasons for their discharge. This information,

contend plaintiffs, forecloses them from obtaining jobs with any other government agencies. The district court in Berg found, "There is no code or symbol connected with any papers or explanations available to prospective employees or the public that identify the reasons underlying the honorable discharge." 436 F. Supp. at 80-81 n.2. The court in Saal disagreed, reasoning that the reasons for Saal's discharge and her reenlistment code were "necessarily reflected in her service record," and that the Navy had "compelled disclosure of her otherwise private sexual activity." 427 F. Supp. at 198. We have been directed to no evidence indicating that the plaintiffs' service records are likely to impose stigma upon them or make it more difficult for them to seek post-

discharge employment. According to the Navy, the documents likely to be examined by future employers would contain no reason for the honorable discharge. On this record, we cannot conclude that the Navy's action has deprived the plaintiffs of a liberty interest.[16] See Bishop v. Wood, supra. See also Knehans, supra, 566 F.2d at 314; Lyons v. Sullivan, 602 F.2d 7, 11 n.6 (1st Cir.), cert. denied, 100 S. Ct. 159 (1979); benShalom, supra, slip op. at 7-8; Ventetuolo v. Burke, supra, 470 F. Supp. 887, 895-96 (D.R.I. 1978), aff'd, 596 F.2d 476 (1st Cir. 1979).

C. Substantive Due Process

Plaintiff's ultimate contention is that the Navy's regulations violate substantive guarantees inherent in the due process clause. We decide at the outset that this case does not require us to address the

question whether consensual private homosexual conduct is a fundamental right, as that term is used in equal protection[17] and some due process cases.[18] If we were to answer in the affirmative, it would follow that the conduct in question is subject to prohibition only to further compelling state interests and that the category used or burden imposed by the regulation must be a necessary, or the least restrictive, way to promote those interests. To formulate the issue in those terms would reflect, we think, a misunderstanding of proper substantive due process analysis.

These appeals were not presented to us as implicating a suspect or quasi-suspect classification. The attacks, rather, were based on the claim that the conduct prohibited by the regulation was protected as an aspect of the fundamental

right of privacy. Substantive due process, not equal protection, was the basis of the constitutional claim, and we address the case in those terms.

The rather formal three-tier analysis of the Court's recent equal protection decisions differs somewhat from its less categorical approach when questions of substantive due process are involved. Recent decisions indicate that substantive due process scrutiny of a government regulation involves a case-by-case balancing of the nature of the individual interest allegedly infringed, the importance of the government interests furthered, the degree of infringement, and the sensitivity of the government entity responsible for the regulation to more carefully tailored alternative means of achieving its goals. See Zablocki v.

Redhail, 434 U.S. 374 (1978); id. at 396 (1978)(Stewart, J., concurring in the judgment)(citing Williams v. Illinois, 399 U.S. 235, 260 (1970)(Harlan, J., concurring in the result); Moore v. City of E. Cleveland, 431 U.S. 494, 499 (1977)(plurality opinion).[19]

Although the Court's approaches to equal protection and due process cases differ, there are important analytic and rhetorical similarities in the doctrines. When conduct, either by virtue of its inadequate foundation in the continuing traditions of our society or for some other reason, such as lack of connection with interests recognized as private and protected, is subject to some government regulation, then analysis under the substantive due process clause proceeds in much the same way as analysis under the lowest tier of

equal protection scrutiny. A rational relation to a legitimate government interest will normally suffice to uphold the regulation. At the other extreme, where the Government seriously intrudes into matters which lie at the core of interests which deserve due process protection, then the compelling state interest test employed in equal protection cases may be used by the Court to describe the appropriate due process analysis. See, e.g., Roe v. Wade, 410 U.S. 113, 155 (1973); Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942). See generally Developments in the Law--The Constitution and the Family, 93 Harv. L. Rev. 1156, 1166-82, 1193-97 (1980).[20]

The case before us lies somewhere

between these two standards. We recognize, as we must, that there is substantial academic comment which argues that the choice to engage in homosexual action is a personal decision entitled, at least in some instances, to recognition as a fundamental right and to full protection as an aspect of the individual's right of privacy. See, e.g., L. Tribe, American Constitutional Law § 15-13 (1978 & Supp. 1979) and authorities cited therein. See also Symposium: Sexual Preference and Gender Identity, 30 Hastings L. Rev. 799 (1979); Gerety, Redefining Privacy, 12 Harv. C.R.-C.L. L. Rev. 233, 280-81 (1977); Richards, Unnatural Acts and the Constitutional Right to Privacy: A Moral Theory, 45 Fordham L. Rev. 1281 (1977); Wilkinson & White, Constitutional Protection for Personal Lifestyle, 62 Cornell L. Rev.

563 (1977); Note, The Constitutionality of Laws Forbidding Private Homosexual Conduct, 72 Mich. L. Rev. 1613 (1974). See generally Comment, Out of the Closet, Out of a Job: Due Process in Teacher Disqualification, 6 Hastings Const. L.Q. 663 (1979); Von Beigel, The Criminalization of Private Homosexual Acts: A Jurisprudential Case Study of a Decision by the Texas Bar Penal Code Revision Committee, 6 Human Rights 23 (1977); Siniscalco, Homosexual Discrimination in Employment, 16 Santa Clara L. Rev. 495 (1976); Comment, A Homosexual's Legal Dilemma, 27 Ark. L. Rev. 687 (1973).

There is substantial authority to the contrary, however. The Supreme Court has issued a summary affirmance of a lower court decision denying a challenge to a state criminal statute prohibiting sodomy

as applied to private consensual homosexual conduct. Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), aff'g 403 F. Supp. 1199 (E.D. Va. 1975). Some commentators, in an effort to limit the holding, have attempted alternate explanations, see, e.g. , L. Tribe, supra § 15-13 at 943.[21] See also benShalom, supra, slip op. at 14-15; New York v. Onofre, summarized in 48 U.S.L.W. (Feb. 12, 1980)(N.Y. Sup. Ct.). Most federal courts, on the other hand, have understood the holding to be that homosexual conduct does not enjoy special constitutional protection under the due process clause. See, e.g., DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327 (9th Cir. 1979) (homosexuals cannot claim protection under 42 U.S.C. § 1985(3); homosexuals not members of suspect or quasi-suspect class);

id. at 334 (Sneed, J., concurring and dissenting)(after Doe, consensual homosexual)(8th Cir. 1979), cert. denied, 100 S. Ct. 667 (1980)(anti-prostitution statute violates no fundamental rights); Gay Alliance of Students v. Matthews, 544 F.2d 162, 166 (4th Cir. 1976)(dicta)(university may regulate homosexual conduct of students, or homosexual conduct which substantially disrupts operation and discipline of school); Lovisi v. Slayton, 539 F.2d 349 (4th Cir. 1976)(en banc), cert. denied, 429 U.S. 977 (1976)("[Doe] necessarily confined the constitutionally protected right of privacy to heterosexual conduct ..."); Mississippi Gay Alliance v. Goudelock, 536 F.2d 1073 (5th Cir.), cert. denied, 430 U.S. 982 (1976)(dicta)(first amendment does not require newspaper to run advertisement

arguably soliciting illegal homosexual conduct); In re Nemetz, 485 F. Supp. 470 (E.D. Va. 1980)(consensual private homosexual relations is a basis for denying petition for naturalization because of lack of good moral character; Virginia's sodomy statute upheld in Doe); Wilson v. Swing, 463 F. Supp. 555 (M.D. N.C. 1978) (adulterous conduct not protected by either first amendment or due process clause). See also Paris Adult Theatre I v. Slaton, 413 U.S. 49, 65-68 (1973). Cf. Zablocki v. Redhail, supra, 434 U.S. at 396-403 (Powell, J., concurring in the judgment). But see New York v. Onofre, supra (sodomy statute unconstitutional as applied to consenting homosexuals). Cf. Carey v. Population Services International, 431 U.S. 678, 688 n.5 (1977)(plurality opinion)(whether and when constitution

prohibits state regulation of private consensual sexual behavior among adults unsettled); benShalom, supra (homosexual tendencies or personality protected).

In light of the above authorities, we can concede arguendo that the reasons which led the Court to protect certain private decisions intimately linked with one's personality, see, e.g., Roe, supra, and family living arrangements beyond the core nuclear family, see, e.g., Zablocki, supra, suggest that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challenge. See, e.g., Doe v. Commonwealth's Attorney, supra, 403 F. Supp. at 1203-05 (Merhige, J., dissenting). Such cases might require resolution of the question whether there is a right to engage in this conduct in

at least some circumstances. The instant cases, however, are not ones in which the state seeks to use its criminal processes to coerce persons to comply with a moral precept even if they are consenting adults acting in private without injury to each other. Instead, these appeals require an assessment of a military regulation which prohibits personnel from engaging in homosexual conduct while they are in the service. We conclude, in these cases, that the importance of the government interests furthered, and to some extent the relative impracticality at this time of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case, outweigh whatever heightened solicitude is appropriate for consensual private homosexual conduct.

The nature of the employer -- the Navy

-- is crucial to our decision. While it is clear that one does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces. As the Court said in Parker v. Levy, 417 U.S. 733, 743 (1974), the military is, "by necessity, a specialized society separate from civilian society." Military services "must insist upon a respect for duty and a discipline without counterpart in civilian life." Schlesinger v. Councilman, 420 U.S. 738, 757 (1975); Department of the Air Force v. Rose, 425 U.S. 352, 367-68 (1976). Regulations which might infringe on constitutional rights in other contexts may survive scrutiny because of military

necessities. See, e.g., Brown v. Glines, 48 U.S.L.W. 4095 (Jan. 21, 1980). See also Sherwood v. Brown No. 78-2475 (9th Cir. May 19, 1980). Thus, for example, a quasi-military entity such as a police department may constitutionally limit the hair length of its officers. Kelley v. Johnson, 425 U.S. 238 (1976).

There are multiple grounds for the Navy to deem this regulation appropriate for the full and efficient accomplishment of its mission. The Navy can act to protect the fabric of military life, to preserve the integrity of the recruiting process, to maintain the discipline of personnel in active service, and to insure the acceptance of men and women in the military, who are sometimes stationed in foreign countries with cultures different from our own. The Navy, moreover, could

conclude rationally that toleration of homosexual conduct, as expressed in a less broad prohibition, might be understood as tacit approval.

An affidavit from the Assistant Chief of Naval Personnel, quoted in the accompanying footnote, outlines the Navy's reasons for its policy.[22] The Navy "perceive[s] that homosexuality adversely impacts on the effective and efficient performance of the mission of the United States Navy in several particulars." The Navy is concerned about tensions between known homosexuals and other members who "despise/detest homosexuality"; undue influence in various contexts caused by an emotional relationship between two members; doubts concerning a homosexual officer's ability to command the respect and trust of the personnel

he or she commands; and possible adverse impact on recruiting. These concerns are especially serious, says the Navy, where enlisted personnel must on occasion be in confined situations for long periods.

We agree with the district courts in Saal and Berg that "the concerns have a basis in fact and are not conjectural." Berg, supra, 436 F. Supp. at 80. Despite the evidence that attitudes towards homosexual conduct have changed among some groups in society, the Navy could conclude that a substantial number of naval personnel have feelings regarding homosexuality, based upon moral precepts recognized by many in our society as legitimate, which would create tensions and hostilities, and that these feelings might undermine the ability of a homosexual to command

the respect necessary to perform supervisory duties. During the discharge hearings of the plaintiffs, various members who testified on their behalf indicated that while the plaintiffs' homosexuality did not impair the efficiency of the Navy, a member's homosexual conduct might in other circumstances cause difficulties, especially aboard a ship. Similarly, the other concerns expressed by the Navy might not apply in any particular case, but do have some basis in fact. These considerations are adequate to sustain the regulation in its military context.

The Navy's blanket rule requiring discharge of all who have engaged in homosexual conduct is perhaps broader than necessary to accomplish some of its goals, as the somewhat narrower regulation now

in effect suggests. In view of the importance of the military's role, the special need for discipline and order in the service, the potential for difficulties arising out of possible close confinement aboard ships or bases for long periods of time, and the possible benefit to recruiting efforts, however, we conclude that at the present time the regulation represents a reasonable effort to accomodate the needs of the Government with the interests of the individual.

Upholding the challenged regulations as constitutional is distinct from a statement that they are wise. The latter judgment is neither implicit in our decision nor within our province to make. We note that the Navy's current regulations permit at least some flexibility in dealing with discharge of homosexuals, while

the regulations before us do not. We are mindful that the rule discharging these plaintiffs is a harsh one in their individual cases, but we cannot under the guise of due process give our opinion on the fairness of every application of the military regulation. It should be plain from our opinion that the constitutionality of the regulations stems from the needs of the military, the Navy in particular, and from the unique recommendation between military demands and what might be constitutionally protected activity in some other contexts.

We reject the other arguments of the plaintiffs in these cases as without merit. The judgments in Beller and Miller are affirmed. The judgment of the court in Saal is reversed.

F O O T N O T E S

1/ The panel opinion in Davis was subsequently reversed, Davis v. Passman, 571 F.2d 793 (5th Cir. 1978)(en banc). That opinion was reversed by the Supreme Court, which implied a cause of action for damages under the fifth amendment. Davis v. Passman, 442 U.S. 228 (1979).

2/ We hold below that the defendant Middendorf is being sued in his official capacity, see p.9 infra.

3/ Saal sued the Secretary of the Navy, first John Chaffee and then Middendorf, in his official capacity and sought equitable relief from the Secretary in his official capacity. She sought, inter alia,

> a permanent injunction, enjoining defendant and his agents from depriving plaintiff of the opportunity to apply for reenlistment despite the fact of her homosexual conduct, requiring that defendant and his agents review said application and act upon it on the merits of plaintiff's service performance record, and requiring that all records concerning the homosexuality-based discharge proceedings against plaintiff either be destroyed or permanently sealed and prevented from being distributed to any person.

4/ In Larson v. Domestic and Foreign Commerce Corp., 337 U.S. 682 (1949), the Court examined the doctrine of sovereign

immunity when equitable relief is requested. Soverign immunity concerns are implicated by injunctions directed against federal officers, said the Court, since "[i]n each such case the question is directly posed as to whether, by obtaining relief against the officer, relief will not, in effect, be obtained against the sovereign." 337 U.S. at 688. In the context of actions seeking nonmonetary relief, the Court indicated that sovereign immunity did not apply where the officer acted unconstitutionally. 337 U.S. at 690-91.

The Court also stated that even where an officer acts unconstitutionally, sovereign immunity applies "if the relief requested cannot be granted by merely ordering the cessation of the conduct complained of but will require affirmative action by the sovereign or the disposition of unquestionably sovereign property." Id. at 691 n.11. The distinction between injunctions which merely order cessation of conduct and those which require affirmative action of the sovereign or disposition of sovereign property, however, has not always been applied when injunctive or declaratory relief has been sought. See, e.g., Vitarelli v. Seaton, 359 U.S. 535 (1959). See also De Lao v. Califano, 560 F.2d 1384, 1391 (9th Cir. 1977); Washington v. Udall, 417 F.2d 1310 (9th Cir. 1969)(interpreting Larson and footnote 11). As we conclude in the text, our holding regarding 5 U.S.C. § 702 makes resolution of the many issues created by Larson and its progeny unneces-

sary.

5/ Bivens and its progeny, see, e.g., Davis v. Passman, 442 U.S. 228 (1979), which hold implicitly that sovereign immunity does not bar damages actions against federal officials in their individual capacity for violation of a person's constitutional rights, do not overcome the sovereign immunity barriers to plaintiffs' damages claims. The Bivens line of cases hold only that sovereign immunity is inapplicable when either damages or equitable relief, see Davis, supra, 442 U.S. at 246 n.24; Midwest Growers Co-Op Corp. v. Kirkemo, 533 F.2d 455, 465-66 (9th Cir. 1976)(equitable relief against individual federal officials), will be had from the federal official personally; they do not hold that sovereign immunity is waived in cases where relief will come from the sovereign. See Davis v. Passman, 544 F.2d 865, 877 (5th Cir. 1977), aff'd in part, vacated in part, 571 F.2d 793 (5th Cir. 1978)(en banc), rev'd and remanded on other grounds, 442 U.S. 228 (1979); American Assoc. of Commodity Traders v. Department of the Treasury, 598 F.2d 1233 (1st Cir. 1979). Cf. Butz v. Economou, 438 U.S. 478, 505 (1978); Duarte v. United States, 532 F.2d 850, 851 (2d Cir. 1976); States Marine Lines, Inc. v. Schultz, 498 F.2d 1146, 1155-56 (4th Cir. 1974); Dean v. Gladney, 451 F. Supp. 1313, 1320 (S.D. Tex. 1978).

The district court in Neal v. Secretary of the Navy, 472 F. Supp. 763 (E.D. Pa. 1979), in an action brought under

28 U.S.C. § 1331 seeking back pay and injunctive relief for violation of the plaintiff's fifth amendment due process rights, held that sovereign immunity did not bar the plaintiff's damages claim. Cf. Dry Creek Lodge, Inc. v. United States, 515 F.2d 926, 930-32 (10th Cir. 1975). The district court's interpretation of Dugan v. Rank, 372 U.S. 609, 621-22 (1963), and Larson, supra, appears somewhat dubious, as these cases hold no more than an officer's unconstitutional acts can be made the basis for suits seeking equitable relief against the officers, see Dugan, supra, 372 U.S. at 622; Larson, supra, 337 U.S. at 686-91.

We recognize that this circuit has apparently not construed Larson and Dugan to bar all actions in which recovery will come from the public treasury. See, e.g., De Lao v. Califano, supra, 560 F.2d at 1391; Washington v. Udall, supra. On the other hand, some decisions have held sovereign immunity a bar to actions seeking money damages in contexts where equitable relief might have been permitted. See, e.g., Denton v. Schlesinger, 605 F.2d 484 (9th Cir. 1979); Glines v. Wade, 586 F.2d 675 (9th Cir. 1978), rev'd on other gds. sub nom. Brown v. Glines, 48 U.S.L.W. 4095 (January 21, 1980); Jaffee v. United States, 592 F.2d 712, 717 (3d Cir. 1979). See also Hoopa Valley Tribe v. United States, 596 F.2d 435, 436-37 (Ct. Cl. 1979). Since the posture of this case does not require us to resolve these issues definitively, we simply reaffirm that sovereign immunity

principles apply in an action against a federal official in his official capacity brought under 28 U.S.C. § 1331 seeking monetary relief such as back pay or damages for lost promotional opportunities when the damages will be paid from government funds rather than the officer's personal funds. See Penn v. Schlesinger, 490 F.2d 700, 704-05 (5th Cir. 1973), rev'd on other grounds, 497 F.2d 970 (5th Cir. 1974)(en banc), cert. denied, 426 U.S. 934 (1976). Cf. Marcus Garvey Square v. Winston Burnett Construction Co., 595 F.2d 1126 (9th Cir. 1979)(interpreting "sue or be sued" provision of 12 U.S.C. § 1702).

6/ The Privacy Act provides in part that no agency shall disclose a record without prior written consent of the individual to whom it pertains unless disclosure is "to those officers and employees of the agency which maintains the record who have a need for the record in the performance of their duties." 5 U.S.C. § 552a(b)(1). Disclosure by the NIS to Captain Ward, as Commanding Officer of the installation, was entirely proper. The commanding officer is responsible for the "safety, well-being and efficiency of his entire command." 32 C.F.R. § 700.702(a). See Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961). See also 32 U.S.C. § 701.107(b)(1)(implementing regulations). Captain Ward had a need for information disclosing a grounds for discharging someone under his command.

Neither was there a violation of 5 U.S.C. § 552a(e)(3), which requires the agency to inform the individual asked to provide information of the principal purposes for which the information is intended to be used and the routine uses which may be made of the information. When Beller volunteered the information regarding his sexual practices he was being questioned in detail by the Naval Investigative Service, albeit originally in connection with a check for a top secret security clearance. Beller must have known that information which disclosed grounds for being discharged could be used in discharge proceedings.

7/ We have some doubt whether these appeals are all within the capable of repetition yet evading review doctrine, see Weinstein v. Bradford, 423 U.S. 147 (1975). The doctrine might be inapplicable if we were to view strictly the requirement that "there [be] a reasonable expectation that the same complaining party would be subjected the the same action again," 423 U.S. at 149. We note that Miller has twice attempted to reenlist and Saal applied for an extension of her enlistment, but, strictly viewed, the action in question here pertains to discharge,, not enlistment. On the other hand, as the Court recently said:

> Although later developments may have "reduce[d] the practical importance of this case" for the parties, it cannot be said that "subsequent events make it ab-

solutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." (Quoting United States v. Phosphate Export Assoc., 393 U.S. 199, 203 (1968).

St. Paul Fire & Marine Insurance Co. v. Barry, 438 U.S. 531, 537-38 (1978). The Court's conclusion that "[w]e cannot assume that petitioners will not re-enter the market in some fashion," id. at 538, although reached in a different factual context, also applies in these appeals. See also Brown v. Board of Bar Examiners, No. CA 79-4529, slip op. at 4227-28 (9th Cir. July 18, 1980)(requirement of reasonable expectation that same complaining party be subject to same action in future not strictly applied).

8/ The due process clause of the fifth amendment includes equal protection components, and fifth amendment equal protection claims are treated the same as fourteenth amendment equal protection claims. See Weinberger v. Wiesenfeld, 420 U.S. 636, 638 n.2 (1975); Schlesinger v. Ballard, 419 U.S. 498, 500 n.3 (1975); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

9/ Since these lawsuits were initiated, the Navy has issued a new set of instructions and regulations governing the discharge of homosexuals. These regulations provide for limited retention of homosexuals. They state in part:

> A homosexual act is bodily contact with a person of the same sex with the intent of obtaining or giving sexual gratification.
>
> . . .
>
> Any member who solicits, attempts, or engages in homosexual acts shall normally be separated from the naval service. The presence of such a member in a military environment seriously impairs combat readiness, efficiency, security and morale.
>
> . . .
>
> A member who has solicited, attempted, or engaged in a homosexual act on a single occasion and who does not profess or demonstrate proclivity to repeat such an act may be considered for retention in the light of all relevant circumstances. Retention is to be permitted only if the aforesaid conduct is not likely to present any adverse impact either upon the member's continued performance of military duties or upon the readiness, efficiency, or morale of the unit to which the member is assigned either at the time of the conduct or at the time of processing according to the alternatives set forth herein.

SECNAV Instruction 1900.9C. The Navy has taken the position in writing that these regulations do not apply retroactively to the plaintiffs in this case.

The issuance of SECNAVIST 1900.9C raises the general principle of appellate procedure by which a reviewing court will apply to a case a new rule that has intervened between its pending decision and the original controversy. Fusari v. Steinberg,419 U.S. 379, 387-89 (1975); Bradley v. School Board, 416 U.S. 696, 710-21 (1974); Richardson v. Wright, 405 U.S. 208 (1972); Thorpe v. Housing Authority, 393 U.S. 268, 281-83 (1969). This rule may be meaningfully applied, however, only to situations in which the new rule might yield a different result; the case of none of the individuals here presents this possibility. Both Beller and Saal have admitted to homosexual acts with various persons. Brief for Appellee (Saal) at 3; Appellant's (Beller's) Opening Brief at 3. The threshold criteria for discretionary retention under the new regulation are "a homosexual act" "on a single occasion"; the two criteria are conjunctive. The case of Miller is closer but no less clear. He has at various times denied being homosexual and expressed regret or repugnance at his acts. Nevertheless, no part of the record in his case, either alone or in combination with any other part, suggests the possibility of our remanding his case for consideration under SECNAVINST 1900.9C. Miller does not himself appear to have suggested that he met the criteria of 1900.9C. If we were to ignore all but the record evidence most favorable to Miller, application of 1900.9C to Miller would still be prevented by his

admission at his hearing to at least two homosexual acts on two separate occasions:

> I had had an experience once before . . . then these two boys came along and we just had the experiences.

Record at 38. See Appellant's (Miller's) Opening Brief at 3.

The clarity of the record on this point obviates the need for us to consider how Thorpe and similar cases might apply to Miller, which would involve, for example, the question of determining whether SECNAVINST 1900.9C might be applied retroactively to anyone. See Bradley, supra, (discussing factors governing retroactivity). Compare letter from H. Leathers, Dept. of Justice, to R. Fox, attorney for D. Beller (May 18, 1978) and letter from Leathers, Dept. of Justice (Apr. 28, 1978), reprinted in App. A. to Appellant's (Beller's) Response to the Appellees' Suggestion that the Appeal Should be Dismissed as Moot, (1900.9C not retroactive) with Declaration of R. J. Woolsey, Acting Sec. of the Navy, (Sept. 14, 1979) in Berg v. Clayton, Civ. No. 76-944 (D.D.C.)(finding 1900.9C inapplicable to Berg for failure to satisfy criteria, not discussing whether inapplicable for additional reason of nonretroactivity).

10/ For example, discharge by reason

of misconduct is permitted for

> Frequent involvement of a discreditable nature with civil and/or military authorities; an established pattern for shirking; an established pattern showing dishonorable failure to pay just debts, and/or dishonorable failure to contribute support to dependents, provided the member has been given a reasonable opportunity to overcome his/her deficiencies subsequent to official notification. . . (T)he member shall be notified of his/her deficiencies and shall be counseled in regard thereto. (emphasis added)

BUPERSMAN 3420185(1)(a). Similarly, with regard to discharge by reason of drug abuse not involving sale or trafficking, "(c)onsideration for either discharge or retention will be predicated upon an evaluation of the member in the context of the whole man concept, i.e., the member's admitted or proven drug abuse will be considered as only one factor in determining ultimate disposition." Id. at (1)(c).

11/ See BUPERSMAN 3420220. That section provides in part:

> Members may be recommended for discharge by reason of unfitness for:
>
> a. Frequent involvement of a discreditable nature with civil or

military authorities.

b. An established pattern for shirking.

c. An established pattern showing dishonorable failure to pay just debts.

d. An established pattern showing dishonorable failure to contribute adequate support to dependents or failure to comply with orders, decrees, or judgements of a civil court concerning support of dependents.

e. Homosexual acts. Processing for discharge is mandatory. (See SECNAVINST 1900.9 series for controlling policy and additional action required in cases involving homosexuality.)

f. Sexual perversion, other than above, including but not limited to lewd and lascivious acts, sodomy, indecent exposure, indecent acts with or assault upon a child, or other indecent acts or offenses. Processing for discharge is mandatory.

g. Drug abuse, the illegal, wrongful or improper use, possession, sale, transfer, or introduction on a military installation of any narcotic substance, marijuana, or dangerous drug, when supported by evidence not attributed to a

urinalysis administered for identification of drug users and not attributable to the member's volunteering for treatment under the exemption program. Discharge of a member for drug abuse shall not be effected until the member has completed a 30-day period of counselling commencing when the member reports his drug abuse or when the member is formally warned by civil or military authorities that he is suspected of drug abuse. Except for drug exemption cases, drug abuse cases normally shall be investigated by the Naval Investigative Service as required in SECNAVINST 6710.1 series. Consideration for either discharge or retention will be predicated upon an evaluation of the member in the context of the whole man concept, i.e., the member's admitted or proven drug abuse will be considered as only one factor in determining ultimate disposition.

h. Unsanitary habits.

4b. Processing for discharge by reason of frequent involvement of a discreditable nature with civil or military authorities, an established pattern for shirking, an established pattern showing dishonorable failure to pay just debts, and/or dishonorable failure to contribute support to dependents, shall not be initiated

until the member has been given a reasonable opportunity to overcome his deficiencies. When it is determined that a member may come within the purview of these specific categories, the member shall be notified of his deficiencies and shall be counseled in regard thereto. If no improvement is forthcoming within a reasonable time, the member shall be processed in accordance with the provisions of this article.

12/ See Martinez v. Brown, 449 F. Supp. 207, 211 (N.D. Cal. 1978); Saal v. Middendorf, 427 F. Supp. 192, 197 (N.D. Cal. 1977).

13/ As the court in Saal noted, 427 F. Supp. at 197 n.3, comments of the discharge board during Saal's hearing suggest the board considered the crucial issue to be whether Saal had engaged in homosexual acts and that fitness evidence was not relevant. The discharge board also seemingly was instructed by the Navy counsel that it had no discretion to retain Saal if it found she had engaged in homosexual acts.

In response to an interrogatory from Miller, the Navy had an opportunity in the district court to demonstrate that in the past it exercised discretion to retain enlisted persons found to be homosexuals. The Navy instead claimed that Miller's question was ambiguous, and summary judgment was entered before

the Navy responded to Miller's more precisely worded question:

> Interrogatory No. 30: If, as the Navy and the Secretary of Defense represented to the United States Court of Appeals for the Seventh Circuit in Champagne, supra, the discharge or separation from the Navy is not mandatory, how many exceptions have been made over the past five years? In other words, how many members of the Navy, identified as "homosexuals" have been retained in the Navy?
>
> Answer No. 30: The use of the term "identified" makes this question impossible to answer. The term is imprecise. More information is needed.

Captain C.R. Ward, the commanding officer who convened the discharge board in Beller, responded in the following way to plaintiff's interrogatories:

> Interrogatory No. 25: The basis for the purported discharge of the plaintiff is for "unfitness." In what way is the plaintiff "unfit?"
>
> Answer No. 25: He is an admitted homosexual.
>
> Interrogatory No. 26: Are all "homosexuals" "unfit" for duty in the Navy?
>
> Answer No. 26: Yes.

14/ We note some slight confusion among the discharge boards regarding their discretion to recommend that an admitted homosexual be retained. The board in Beller's case recommended retention 2-1, and the discharge board in Berg was instructed that it had discretion to recommend retention, 591 F.2d at 851. The board in Saal's case was apparently told it had no discretion to recommend retention based on fitness, and the convening authority in Miller's case thought all homosexuals unfit. These discrepancies are of no constitutional signficance. Any errors made in instructing the boards would operate to the benefit of the plaintiffs. The boards did permit introduction of evidence relevant to whether the individual should be retained. Finally, the ultimate decision to retain rests with the Secretary. See Berg, supra, 436 F. Supp. at 81.

15/ We think our conclusion is consistent with the analysis of the district court in Saal, 427 F. Supp. at 199 n.6.

16/ That the facts are disclosed publicly in the course of this litigation does not effect our conclusion. A discharge under less than honorable conditions before expiration of a person's current term of enlistment, such as that originally awarded by the Navy to these plaintiffs, might present different considerations. We acknowledge some uncertainty regarding the public disclosure of the allegedly stigmatizing information. Were this issue crucial

to our disposition, we might remand for a factual determination by the district court.

17/ See, e.g., Shapiro v. Thompson, 394 U.S. 618 (1969).

18/ See, e.g., Roe v. Wade, 410 U.S. 113, 155 (1973).

19/ The kind of all-or-nothing substantive due process approach exemplified by the district court in Berg, supra, which asks simply whether homosexual conduct is protected as a fundamental right, does not, we think, reflect the complexity of the Court's analysis.

20/ The district courts, the Government, and the plaintiffs advance other due process and equal protection theories which require brief discussion. The due process clause does not require the Government to show the particularity that the reasons for the general policy of discharging homosexuals from the Navy exist in a particular case before discharge is permitted. In requiring the Government to act rationally as an employer, some courts have required the Government to demonstrate in discharge proceedings not only that the plaintiff falls within the general category which the applicable regulations list as grounds for discharge, but also that the particular plaintiff is unfit or unsuitable for continued employment. See, e.g., cases cited at Tribe, supra Sec. 15-13 at 941-42 n.3; Norton v. Macy, 417 F.2d 1161 (D.C. Cir.

1969); benShalom, supra, slip op. at 15; Society for Individual Rights v. Hampton 63 F.R.D. 99 (N.D. Cal. 1973), aff'd on other grounds, 528 F.2d 905 (9th Cir. 1975); Martinez, supra, Saal, supra; Gay Law Students Assoc. v. Pacific Tel. & Tel. Co., 595 P.2d 592 (Cal. 1979). See generally Tribe, Structural Due Process, supra; Van Alstyne, Cracks in "The New Property"; Adjudicative Due Process in the Administrative State, 62 Cornell L. Rev. 445 (1977). Such individual hearings might be appropriate on an equal protection theory when the grounds for discharge employs a classification subject to a heightened standard of scrutiny such as gender, see, e.g., Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974); Crawford v. Cushman, 531 F.2d 1114 (2d Cir. 1976), or when the regulations condition discharge on the exercise of protected activities, see, e.g., United States Dept. of Agriculture v. Murry, 413 U.S. 508 (1973). Cf. benShalom supra (Army regulations requiring discharge of persons expressing homosexual tendencies, as well as engaging in homosexual conduct, violate first amendment and due process clause; sexual personality and preference, as opposed to conduct, is protected by constitutionality right of privacy). See generally Note, The Irrebuttable Presumption Doctrine in the Supreme Court, 87 Harv. L. Rev. 1534 (1974). Compare, e.g., Upshaw v. McNamara, 435 F.2d 1188 (st Cir. 1970)(upholding under rational basis test state regulation permitting exclusion of all felons

pardoned on grounds other than innocence from city police department), with, e.g., Smith v. Fusenich, 440 F. Supp. 1077 (D. Conn. 1977) (apparently faulty application of rational relation scrutiny). Under the analysis described in our opinion, individual treatment in some circumstances might be required by substantive due process, depending on the outcome of the balancing test. This case, however, involves neither middle-tier equal protection analysis nor a situation where the only alternative means available to satsify the Government's goals consistent with due process is an individual showing of unfitness. Cf. Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) (rational relation test applied in equal protection challenge to mandatory retirement age for police force). While the substantive due process test we describe in the text does proceed on a case-by-case basis, it does not necessarily require the Government in each case involving changing norms to show that the reasons for the regulation apply in the particular case. Cf. Murgia, supra, 427 U.S. at 317-27 (Marshall, J., dissenting)(equal protection analysis); Crawford v. Cushman, supra, 531 F.2d at 1125 (same); Tribe, Structural Due Process, supra.

As a purported application of so-called rational relation scrutiny, some of the above courts have, we think,

misunderstood the meaning of rationality in the Court's due process cases. Nearly any statute which classifies people may be irrational as applied in particular cases. See Weinberger v. Salfi, 422 U.S. 729 (1975). Discharge of the particular plaintiffs before us would be rational, under minimal scrutiny, not because their particular cases present the dangers which justify Navy policy, but instead because the general policy of discharging all homosexuals is rational. See Berg, supra, 436 F. Supp. at 80.

In Massachusetts Board of Retirement v. Murgia, supra, the Court held that strict scrutiny should not be applied to the classification of age, even though "the treatment of the aged in this nation has not been wholly free of discrimination." 427 U.S. at 313. The Court then concluded that the state's mandatory retirement policy rationally furthered legitimate goals. Id. at 315-16. The case involved an equal protection to the Government's action, and we find its result consistent with the Court's later development of due process doctrine. Our conclusion is also consistent with Singer v. United States Civil Service Commission, 530 F.2d 247 (9th Cir. 1976), vacated in light of new position of the Government, 429 U.S. 1034 (1977), which held that the Civil Service may not summarily discharge a person without some showing that his or her homosexual conduct is in some way likely to impair the efficiency of the Civil Service. The case did not,

however, hold that the Government must always conduct an individualized hearing on fitness before a homosexual may be discharged from any government employment.

In addition to pursuing an analysis which we held above to be erroneous, the district court in Saal also appeared to declare due process violated because some other groups subject to discharge were not required to be discharged. See 427 F. Supp. at 201-02. Some personnel are given a second chance to "overcome" his/her deficiencies subsequent to official notification," BUPERSMAN 3420185a. Those found to have engaged in drug abuse are to be evaluated "in the context of the whole man concept," and the fact of drug abuse "will be considered as only one factor in determining ultimate disposition." Id at c. Giving someone a second chance to overcome his or her deficiencies is not at all the same as requiring fitness of the individual to be considered. In any event, the fact that the Navy's choice of categorization is overinclusive and underinclusive does not mean that the regulations violate due process, as we discuss in the text. The Navy could rationally conclude that homosexuality presented problems sufficiently serious to justify a policy of mandatory discharge while other grounds for discharge did not.

21/ Professor Tribe argues that the holding of Doe might be only that no prosecution was threatened and therefore any

adjudication of the merits was premature, see Poe v. Ullman, 367 U.S. 497 (1961). One appellate court in New York has apparently adopted this interpretation of Doe, see New York v. Onofre, supra.

22/ The affadavit states in part:

> It is considered that administrative processing is mandatory. This is because it is perceived that homosexuality adversely impacts on the effective and efficient performance of the mission of the United States Navy in several particulars.
>
> (a) Tensions and hostilities would certainly exist between known homosexuals and the great majority of naval personnel who despite/detest homosexuality, especially in the unique close living conditions aboard ships.
>
> (b) An individual's performance of duties could be unduly influenced by emotional relationships with other homosexuals.
>
> (c) Traditional chain of command problems could be created, i.e., a proper command relationship could be subverted by an emotional relationship; an officer or senior enlisted person who exhibits homosexual tendencies will be unable to maintain the necessary respect and trust from the great majority of naval personnel who despise/detest homosexuality, and this would most certainly

degrade the individual's ability to successfully perform his duties of supervision and command.

(d) There would be an adverse impact on recruiting should parents become concerned with their children associating with individuals who are incapable of maintaining high moral standards.

(e) A homosexual might force his desires upon others or attempt to do so. This would certainly be disruptive.

(f) Homosexuals may be less productive/effective than their heterosexual counterparts because of:

(1) Fear of criminal prosecution;

(2) Fear of social stigmatization;

(3) Fear of loss of spouse and/or family through divorce proceedings as a result of disclosure;

(4) Undue influence by a homosexual partner.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AG 1 DENNIS R. BELLER, Plaintiff-Appellant, vs. THE HONORABLE J. WILLIAM MIDDENDORF, Secretary of the Navy, et al., Defendants-Appellees.	No. 77-1354
JAMES LEE MILLER, Plaintifff-Appellant, vs. DONALD H. RUMSFELD, Secretary of Defense, et al., Defendants-Appellees.	No. 77-1671

MARY ROSEANN SAAL,

Plaintiff-Appellee,

vs.

J. WILLIAM MIDDENDORF, Secretary of the United States Navy, in this official capacity,

Defendant-Appellant.

No. 77-2461

O R D E R

Appeal from the United States District Court for the Northern District of California

Before: BROWNING, Chief Judge, and KENNEDY, Circuit Judges, and CRISTENSEN,* District Judge.

In the opinion that was filed on October 23, 1980, please insert the following language which was inadvertently omitted at page 29, lines 4-5, after the word "homosexual ": "behavior not characterized as fundamental right); J.B.K., Inc. v. Caron, 600 F.2d 710 . . .".

*The Honorable A. Sherman Cristensen, Senior United States District Judge for the District of Utah, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AG 1 DENNIS R. BELLER, Plaintiff-Appellant, vs. THE HONORABLE J. WILLIAM MIDDENDORF, Secretary of the Navy, et al., Defendants-Appellees.	)	No. 77-1354 ORDER

Appeal from the United States District Court for the Northern District of California

Before: BROWNING, Chief Judge, and KENNEDY, Circuit Judges, and CHRISTENSEN,* District Judge.

The petition for rehearing is denied.

*Honorable A. Sherman Christensen, Senior United States District Judge for the District of Utah, sitting by designation.

10 U.S.C.S. § 1552. Correction of military records: claims incident thereto

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

(b) No correction may be made under subsection(a) unless the claimant or his heir or legal representative files a request therefor before October 26, 1961, or within

three years after he discovers the error or injustice, whichever is later. However, a board established under subsection (a) may excuse a failure to file within three years after discovery if it finds it to be in the interest of justice.

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. If the claimant is dead, the money shall be paid, upon demand, to his legal representative. However, if no demand for repayment is made by a legal

representative, the money shall be paid -

(1) to the surviving spouse, heir, or beneficiaries, in the order prescribed by the law applicable to that kind of payment;

(2) if there is no such law covering order of payment, in the order set forth in section 2771 of this title [10USCS § 2771]; or

(3) as otherwise prescribed by the law applicable to that kind of payment.

A claimant's acceptance of a settlement under this section fully satisfies the claim concerned. This section does not authorize the payment of any claim compensated by private law before October 25, 1951.

(d) Applicable current appropriations are available to continue the pay, allowances, compensation, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled

to those benefits, but for not longer than one year after the date when his record is corrected under this section if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate. Without regard to qualifications for reenlistment, or appointment or reappointment, the Secretary concerned may reenlist a person in, or appoint or reappoint him to, the grade to which payments under this section relate.

(e) No payment may be made under this section for a benefit to which the claimant might later become entitled under the laws and regulations administered by the Administrator of Veterans' Affairs. (Aug. 10, 1956, ch 1041, § 1, 70A Stat. 116; June 29, 1960, P.L. 86-533, § 1(4), 74 Stat. 246.)

SECNAV INSTRUCTION 1900.9A

From: Secretary of the Navy

To: All Ships and Stations

Subj: Policy for the Separation of Members of the Naval Service by Reason of Homosexuality

1. Purpose. To prescribe the authority, criteria, and policy for the separation of members from the naval service by reason of homosexuality. The policies herein prescribed are applicable to any member of any component of the naval service.

2. Cancellation. SECNAV instruction 1900.9 of 20 April 1964 is canceled and superseded.

3. Definition. Homosexual acts are acts involving sexual activity with another person of the same sex. As used in this

instruction homosexuality includes the expressed desire, tendency, or proclivity toward such acts whether or not such acts are committed.

4. Policy. The following policy is prescribed:

a. General. Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization. In developing and documenting cases involving homosexual conduct, commanding officers should be keenly aware that members involved in homosexual acts are security and reliability risks who discredit themselves and the naval service by their homosexual conduct. Their prompt separation is essential. At the same time, every safeguard must be taken to insure against unjust action that will

stigmatize an innocent person.

b. Degrees of Homosexuality. This instruction is limited in its application to "true," "confirmed," or "way of life" homosexuals. Knowing participation in a homosexual act or strong tendencies toward such acts constitutes a sufficient basis for proceeding hereunder, and the existence or absence of prior, similar conduct will be considered as matter in mitigation or aggravation.

c. Intoxication. Intoxication is a circumstance to be considered in determining final disposition but it does not constitute an excuse for homosexual conduct.

d. Personnel Retired with Pay. Members not on active duty who are currently entitled to receive retainer, retired, or retirement pay by reason of prior service, will not be proceeded against under

this instruction otherwise than by trial before a general courtmartial. Such a trial must be approved in advance by the Secretary of the Navy. (See JAGMAN, sec. 0107.d)

e. Disposition. Final disposition of homosexual cases will be accomplished through processing under the Uniform Code of Military Justice and/or by administrative action in accordance with applicable regulations. Nothing contained herein should be construed as requiring a command to refer a case for trial by court-martial. In this connection, there is no right on the part of any individual to demand trial by court-martial in lieu of administrative processing.

5. Action. The following action is directed:

a. Investigation. Commanding officers

receiving information indicating that a person in the naval service has been involved in a homosexual act or possesses homosexual tendencies shall inquire thoroughly into the matter to determine all the facts and circumstances of the case. The development of information should be directed toward the eventual alternative course of action which includes: (1) dismissal of the matter if it is clearly the product of erroneous or false report; (2) referral of charges to courts-martial in appropriate cases; and (c) processing for an administrative separation. In order that the proper course of action may be selected, it is essential that great care be exercised in the development of evidence and that all facts and statements be documented and prepared in the proper manner. In documenting a homosexual case, care must be exercised

that all persons involved are investigated and reported. Initial information, if deemed appropriate, should be referred to the nearest Naval Investigative Service Office, which will render professional investigative assistance and advice. If the assistance of the Naval Investigative Service is not available or cannot be obtained in a reasonable time, the commanding officer should proceed with the development of the case without delay.

b. Disposition

(1) Dismissal of Matter. If upon completion of the investigation outlined above, the commanding officer finds that the information received by him regarding homosexual conduct is unfounded in fact or that it stems from erroneous or false sources, he may conclude all action in the case.

(2) Referral to Trial by Court-

Martial. In those cases where the investigation reveals evidence of aggravated homosexual conduct such as threat of bodily harm, acts with minors under 16 years of age, assault, or in any other cases deemed appropriate because of special circumstances, the commanding officer should consider referring the case to an appropriate court-martial.

(3) Administrative Separation. If action is not taken under subparagraph (1) or (2) above, the commanding officer should institute action with a view toward administrative separation.

c. Classification and Procedures. Personnel coming within the purview of this instruction fall into four categories. While these categories can overlap in individual cases, such classification provides for flexibility in departmental handling.

(1) Class 1

(a) Definition. Persons whose homosexual conduct has been accompanied by assault or coercion characterized by an act in which one party involved did not willingly cooperate or consent, or where the consent was obtained through force, fraud, or intimidation, or any homosexual act with a child under the age of 16 whether the child cooperated or not.

(b) Procedure. Normally, this type of case, representing the most serious type of homosexual transgression, should be resolved in accordance with the Uniform Code of Military Justice. Although resolution by trial is considered to be the most suitable way of handling Class I offenders, administrative processing in the same manner as set forth in Class II cases may be followed

when the commanding officer considers that the best interest of the service will be served.

(2) Class II

(a) Definition. Persons who, while in the naval service, have engaged in one or more homosexual acts, or have attempted homosexual acts, or have solicited a homosexual act under aggravated conditions, or whose acts do not fall in the categories of Class I, Class III, or Class IV.

(b) Procedure. Normally in Class II cases, disposition will be accomplished by processing for administrative separation. Disposition by trial is not precluded and may be appropriate.

(3) Class III

(a) Definition. Persons who exhibit, profess, or admit homosexual tendencies, or who solicit a homosexual act in

absence of aggravated circumstances, and whose conduct does not come within the categories of Class I, II, or Class IV.

(b) Procedure. Processing in accordance with administrative-separation procedures is generally appropriate for Class III cases. When appropriate, and provided jurisdiction exists, court-martial action is not precluded.

(4) Class IV

(a) Definition. Persons who have engaged in homosexual activity prior to their current period of active duty or who fail to admit their homosexual acts at the time of their enlistment or appointment--thereby perpetuating a fraudulent entry.

(b) Procedure. Process for administrative discharge by reason of fraudulent entry.

d. Unless allegations are dismissed

as being without basis, individuals shall be referred to a medical officer to determine whether psychiatric evaluation is warranted as part of the evaluation processing for appropriate disposition of cases. If psychiatric evaluation is considered necessary, it shall be conducted before proceeding further with administrative or judicial proceedings. In cases where the individual is found to be suffering from a psychosis or neurosis that detracts materially from his mental responsibility for homosexual involvement, he shall be considered for separation on the basis of medical unfitness.

6. Processing. When the investigation described in earlier paragraphs has been completed and the commanding officer has determined that there is sufficient evidence to warrant administrative processing a member for further evaluation

and disposition, the processing will be in accordance with the appropriate articles of the Bureau of Naval Personnel Manual and the U.S. Marine Corps Separation oand Retirement Manual.

JOHN W. WARNER
Secretary of the Navy

32 Code of Federal Regulations 41.4(a) (1976) provides:

> The Armed Forces have the right and duty to separate from the Service, with an appropriate characterization of service, those members who clearly demonstrate they are unqualified for retention. At the same time, such members have rights which shall be protected.

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FILED
MAY 12 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1390

In the Supreme Court of the United States

OCTOBER TERM, 1980

DENNIS R. BELLER, PETITIONER

v.

JOHN F. LEHMAN, JR., SECRETARY OF THE NAVY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was denied due process when he was discharged from the Navy for engaging in homosexual acts without being given an explanation why the Secretary of the Navy chose not to exercise his discretion to retain petitioner.

2. Whether Navy regulations governing discharge of service members who engage in homosexual acts violate petitioner's right to privacy.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 56a-155a) is reported at 632 F. 2d 788. The opinions of the district court (Pet. App. 4a-53a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 1980, and a petition for rehearing was denied on November 21, 1980 (Pet. App. 156a). The petition for a writ of certiorari was filed on February 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

10 U.S.C.1169 provides in relevant part:

> No regular enlisted member of an armed force may be discharged before his term of service expires, except
>
> (1) as prescribed by the Secretary concerned * * *.

The regulations prescribing the grounds for discharge of service members who engage in homosexual acts that were in effect when petitioner was discharged are quoted by the district court at Pet. App. 7a-9a and reproduced at Pet. App. 161a-171a. The instruction of the Secretary that is currently in effect is attached in an appendix, *infra*, 1a-9a.

STATEMENT

1. On December 19, 1975, following a hearing before an administrative discharge board at which he was represented by counsel, petitioner was ordered honorably discharged from the Navy for unfitness, because of his having engaged in homosexual acts during his Naval service (Pet. App. 10a, 69a). Navy regulations in effect at the time of petitioner's discharge required "prompt separation" for unfitness of those service members "involved in homosexual acts" (Pet. App. 8a).

Petitioner then filed the present action in the United States District Court for the Northern District of California. He alleged that (1) the Navy was attempting to breach its contract with him, (2) the Navy had violated the Privacy Act, 5 U.S.C. 552a, by permitting the administrative discharge board to predicate his involuntary separation from the Navy on records pertaining to him that had been obtained for another purpose (*i.e.*, the decision whether to grant him a Top Secret security clearance) without his consent, and (3) the discharge violated his statutory and constitutional rights to privacy and due process—specifically, the Navy's definition of "homosexual" violates substantive due process "in that [it] would include any member of the Navy who has ever even patted affectionately a member of the same sex" (R. 4).[1] Petitioner sought to

---

[1] "R." refers to the record on appeal.

enjoin his discharge from the Navy, to require the Navy to expunge from his records any reference to his discharge for homosexuality, a declaration that his enlistment contract was valid, and damages under the Privacy Act (Pet. App. 69a-70a; R. 4).

The district court granted petitioner's request for a temporary restraining order preventing his discharge (Pet. App. 1a-3a), but subsequently denied his motion for a preliminary injunction (*id.* at 4a-47a). The court rejected the various jurisdictional arguments made by the Navy, including the contention that petitioner be required to exhaust administrative remedies (*id.* at 11a-26a). The court ruled, however, that petitioner had failed to show any likelihood that he would succeed in proving that the Navy either had violated the Privacy Act or had breached his enlistment contract (*id.* at 35a-36a). The court also found that petitioner had failed to demonstrate a strong likelihood of success on his claim that the Navy regulations were unconstitutionally vague and overbroad, because "there is no real question about [petitioner's] knowledge and understanding of what activity constituted homosexual conduct within the proscription of the Navy's regulations." Therefore, the court remarked, "[petitioner] lacks standing to challenge the application of the Navy's regulation to the hypothetical conduct of others, since he is well within its prohibitions" (*id.* at 38a-39a).

Thereafter, the district court granted the Navy's motion for summary judgment (Pet. App. 48a-55a), incorporating by reference parts of its previous memorandum of decision denying a preliminary injunction (*id.* at 51a).

2. Petitioner's appeal was consolidated with two other appeals involving Navy members discharged for engaging in homosexual acts (Pet. App. 57a), and the court of appeals issued a consolidated opinion (*id.* at 56a-153a). The court of appeals, as had the district court, rejected the Navy's jurisdictional arguments (*id.* at 82a-85a), including

the claim that petitioner was required to exhaust administrative remedies (*id.* at 92a-95a). It also rejected the Navy's suggestion that petitioner's action had been rendered moot by the expiration of his enlistment contract and his failure to apply for reenlistment following his discharge (*id.* at 86a-92a). The appellate court affirmed the district court's rejection of petitioner's Privacy Act claim (*id.* at 82a-83a, 135a-136a n.6) and sustained the constitutionality of the Navy's regulations on the ground that they represent "a reasonable effort to accommodate the needs of the Government with the interests of the individual" (*id.* at 128a). The court of appeals also rejected petitioner's vagueness and overbreadth claims (see *id.* at 129a).

ARGUMENT

1. Petitioner does not contend that "homosexual personnel have a Constitutional right to remain in the Armed Forces" (Pet. 17). Rather, petitioner claims that "he was entitled to articulated reasons why he should not be considered as an exception to the general policy" (*ibid.*), and he asserts that there is a conflict among the courts of appeals on the question whether due process requires the Secretary of the Navy to give reasons for declining to exercise his discretion to retain a service member who engages in homosexual acts. Further judicial review of this contention is unwarranted because the claimed conflict is largely illusory, because the Navy's regulations concerning the discharge of homosexuals have been revised to ensure equal treatment in all future cases, and because even if petitioner had been afforded the procedural rights he requests, the ultimate result would have been no different: he would have been discharged from the Navy.

Petitioner contends that there is a conflict between the decision below and the decisions in *Matlovich* v. *Secretary of the Air Force*, 591 F. 2d 852 (D.C. Cir. 1978), *Berg* v. *Claytor*, 591 F. 2d 849 (D.C. Cir. 1978), and *Champagne* v.

Schlesinger, 506 F. 2d 979 (7th Cir. 1974), concerning the entitlement of a service member who is discharged for homosexuality to an explanation of why the Secretary did not exercise discretion to retain him. We view this disagreement among the circuits as largely illusory because it arises out of the District of Columbia Circuit's misconception of the extent to which such discretion exists.[2] Both petitioner and Berg were discharged pursuant to Secretary of the Navy Instruction (SECNAVINST) 1900.9A (31 July 1972) (Pet. App. 161a-171a), which provided in pertinent part (Pet. App. 162a):

> a. General. Members involved in homosexuality are military liabilities who cannot be tolerated in a military organization. In developing and documenting cases involving homosexual conduct, commanding officers should be keenly aware that members involved in homosexual acts are security and reliability risks who discredit themselves and the naval service by their homosexual conduct. Their prompt separation is essential. At the same time, every safeguard must be taken to insure against unjust action that will stigmatize an innocent person.

The court below correctly construed this instruction as, standing alone, requiring the discharge of homosexuals. But the appellate court also recognized the existence of a power in the Secretary outside of this regulation to retain homosexuals in an extraordinary case of military necessity.

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[2]In *Champagne* v. *Schlesinger*, 506 F. 2d 979 (7th Cir. 1974), the court of appeals held only that the plaintiffs in that case were required to exhaust their remedies before the Board of Corrections of Naval Records. Although the *Champagne* court expressed no view either on the merits of the claims in that case or on the question whether the Navy's discharge regulations were mandatory (506 F. 2d at 984), in *Champagne*, as in the District of Columbia cases, the government broadly portrayed the Navy's discretion to retain homosexuals (see 506 F. 2d at 983-984).

Given this extremely limited discretion, it would serve no purpose to provide a statement of reasons in virtually every case explaining why the Secretary had determined not to retain a homosexual service member. As the court below observed (Pet. App. 101a-102a; footnote omitted):

> [A]n individual with an otherwise fine service record will not be retained unless the Secretary concludes his record marks him as being highly unusual or especially valuable to the Navy. This kind of consideration does not contemplate evaluating the fitness of an individual to continue military service.
>
> For our purposes, therefore, the applicable Navy practices may be summarized as follows: the Secretary will discharge a person found by a discharge board to have engaged in homosexual acts covered by the regulations. The Secretary has discretion to retain a person in rare instances, but these instances are unrelated to the fitness to serve of the particular individual or the reasons why the Navy in general discharges homosexuals.

In contrast, in *Berg* and *Matlovich* the District of Columbia Circuit erroneously, but likely in partial reliance on government representations, construed SECNAVINST 1900.9A and the Air Force's counterpart as providing for more instances than in fact exist in which the Secretary might exercise discretion to retain a service member who had engaged in homosexual acts. Accordingly, the court in those cases further found that the failure to exercise the broad discretion it perceived the Secretary to possess required him to furnish the discharged service member with a statement of reasons. *Matlovich* v. *Secretary of the Air Force, supra*, 591 F. 2d at 855-861; *Berg* v. *Claytor, supra*, 591 F. 2d at 850-851.[3] Thus, no court of appeals has dis-

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[3]In contrast to the present case and *Berg* v. *Claytor*, *Matlovich* was an Air Force discharge and, accordingly, involved a wholly different

agreed with the decision below holding both that (i) exceptions to the Navy's 1972 discharge requirement were limited to instances of "military necessity," and (ii) the Secretary need not explain why a discharged homosexual does not fall within that extremely narrow category.

In any event, whatever distinctions may once have existed are no longer of importance. Subsequent to petitioner's discharge the Navy twice has revised its homosexual discharge regulations to make clear under what circumstances, in addition to "military necessity," a service member could expect to be retained. The first revision occurred in 1978, when the Navy formally established a limited exception to mandatory exclusion of service members who engage in homosexual acts, applicable where the homosexual conduct constituted a single isolated act, where the service member did not profess or demonstrate proclivity to repeat such an act, and where retention of the service member would not adversely affect either the performance of the individual's duties or the readiness, efficiency or morale of his unit (Pet. App. 137a-138a).

The second revision occurred in 1981 in order to implement DOD Directive 1332.14 (16 Jan. 1981), 46 Fed. Reg. 9571 (1981), which imposes upon all military departments a uniform policy governing the discharge of homosexuals. The Secretary of the Navy's instruction implementing this

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regulation. Unlike SECNAVINST 1900.9A, the applicable Air Force regulation contained an express grant of discretion to retain homosexuals. It provided for "a general policy of discharging Air Force members determined to have performed homosexual acts. Exceptions to the policy were contemplated if 'the most unusual circumstances exist and provided the airman's ability to perform military service has not been compromised' " (*Matlovich* v. *Secretary of the Air Force*, *supra*, 591 F. 2d at 853 n.1). Nonetheless, *Berg* and *Matlovich* were consolidated for argument on appeal, and the services' position was that the same discretion was vested in each of them. See Brief for Appellees in *Berg* v. *Claytor*, No. 77-1785 (D.C. Cir.), at 50-51. See also *Ashton* v. *Civiletti*, 613 F. 2d 923, 928 (D.C. Cir. 1979).

directive makes discharge mandatory for admitted homosexuals (unless the admission is disproved) and service members who have married or attempted to marry a person of the same sex. It also establishes limited grounds for retention of a service member who has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts. In these circumstances, under the current instruction a service member will be retained only if it is found that (i) the conduct was a departure from his usual behavior, is unlikely to recur, and was not accomplished by force, coercion, or intimidation during the service member's period of military service, (ii) retention of the service member would be consistent with the interest of the naval service in proper discipline, good order and morale, and (iii) the service member does not desire or intend to engage in homosexual acts. Finally, the revised instruction expressly recognizes the power of the Secretary to suspend separation "for a limited period of time in the interests of national security." SECNAVINST 1900.9D (12 Mar. 1981).[4]

Thus, the revision of the Navy regulation has eliminated any prior practical conflict that may have existed. Pursuant to the current Navy policy, a service member, wherever located, will be entitled to retention only if he meets the carefully and narrowly delineated standards set forth in SECNAVINST 1900.9D or if he qualifies for the rare exercise of discretion on "military necessity" grounds. Moreover, any member of the Navy who is discharged under the new regulations will be able to obtain a statement of reasons for his discharge by exhausting his administrative remedies to the Board of Corrections of Naval Records, since a denial of relief by the Board would, in effect, explain that the member's discharge was based on his failure to satisfy the

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[4]A copy of the instruction as revised in 1981 is attached as an appendix to this brief (App., *infra*, 1a-9a).

clearly delineated standards set forth in SECNAVINST 1900.9D.[5]

In these circumstances, no useful purpose would be served by further review of petitioner's discharge. Because the regulation in effect at the time of petitioner's discharge has since been revised twice, a decision in this case is likely to have little continuing significance. Moreover, even if petitioner had received a statement of reasons for the Secretary's refusal to exercise discretion in his case, the ultimate result would be the same: he would have been discharged from the service. Under either the former or the current standard, the Navy plainly had adequate reasons for his nonretention because, by petitioner's own admission (Pet. 6-7), his homosexuality consisted of far more than a single isolated incident, and there is nothing in the record or in petitioner's background to suggest that he was "highly unusual or especially valuable to the Navy" (Pet. App. 102a).

2. Asserting that "[t]he case law is in disarray" (Pet. 22), petitioner urges this Court to consider the question "whether consensual private homosexual conduct is protected by the due process or equal protection clauses of the Federal Constitution." Whatever the state of the law may be concerning that broad question,[6] the court of appeals' narrow holding

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[5]Petitioner also alleges (Pet. 18-20) a conflict among the circuits concerning whether a service member who challenges his discharge on the ground of homosexuality must exhaust his administrative remedies before bringing suit. However, as noted above (see pages 3-4, *supra*), petitioner prevailed on this issue in the courts below (see Pet. App. 92a-95a) and hence received the benefit of the no-exhaustion rule.

[6]The law on that question is not quite as unsettled as petitioner portrays it (Pet. 20-24). In *Doe* v. *Commonwealth's Attorney for the City of Richmond*, 403 F. Supp. 1199 (E.D. Va. 1975), aff'd, 425 U.S. 901 (1976), this Court summarily affirmed a three-judge court's ruling that Virginia's criminal statute prohibiting sodomy constitutionally could be applied to private, consensual homosexual conduct. Petitioner

carefully avoided the issue.[7] The court "decide[d] at the outset that this case does not require us to address the question whether consensual private homosexual conduct is a fundamental right, as that term is used in equal protection and some due process cases" (Pet. App. 111a-112a; footnotes omitted). Rather, the court "concede[d] arguendo that the reasons which led the [Supreme] Court to protect certain private decisions intimately linked with one's personality, *see, e.g., Roe* [v. *Wade*, 410 U.S. 113 (1973)] and family living arrangements beyond the core nuclear family, *see, e.g., Zablocki* [v. *Redhail*, 434 U.S. 374 (1978)] suggest that some kinds of government regulation of private consensual homosexual behavior may face substantial constitutional challange" (Pet. App. 121a). Nonetheless, it held (*id.* at 122a) that "the importance of the government interests furthered, and to some extent the relative impracticality at this time of achieving the Government's goals by regulations which turn more precisely on the facts of an individual case, outweigh whatever heightened solicitude is appropriate for consensual private homosexual conduct." The

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relies (Pet. 24), however, on *Carey* v. *Population Services International*, 431 U.S. 678, 694 n.17 (1977), in which the plurality "observe[d] that the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." In view of the context in which that observation was made, *i.e.*, a challenge to the sale of contraceptives to minors, it is doubtful that the footnote reference was to private consensual *homosexual* behavior. See 431 U.S. at 718 n.2 (Rehnquist, J., dissenting) ("[w]hile we have not ruled on every conceivable regulation affecting [adult private consensual sexual] conduct the facial constitutional validity of criminal statutes prohibiting certain consensual acts has been 'definitively' established. *Doe* v. *Commonwealth's Attorney*, 425 U.S. 901 (1976). See *Hicks* v. *Miranda*, 422 U.S. 332, 343-344 (1975)").

[7] As a matter of procedural due process, the court of appeals held (Pet. App. 103a-111a) that petitioner, as a homosexual, had no property interest in continued employment by the Navy in view of the Navy's regulations mandating the discharge of homosexuals, and that the Navy's action did not deprive petitioner of a liberty interest.

court explained that its decision was based largely on the military context of the case (*id.* at 122a-124a, 126a-127a; citations omitted):

> The nature of the employer—the Navy—is crucial to our decision. While it is clear that one does not surrender his or her constitutional rights upon entering the military, the Supreme Court has repeatedly held that constitutional rights must be viewed in light of the special circumstances and needs of the armed forces. As the Court said in *Parker* v. *Levy*, 417 U.S. 733, 743 (1974), the military is "by necessity, a specialized society separate from civilian society." Military services "must insist upon a respect for duty and a discipline without counterpart in civilian life." Regulations which might infringe on constitutional rights in other contexts may survive scrutiny because of military necessities.
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> Despite the evidence that attitudes towards homosexual conduct have changed among some groups in society, the Navy could conclude that a substantial number of naval personnel have feelings regarding homosexuality, based upon moral precepts recognized by many in our society as legitimate, which would create tensions and hostilities, and that these feelings might undermine the ability of a homosexual to command the respect necessary to perform supervisory duties. During the discharge hearings of the plaintiffs, various members who testified on their behalf indicated that while the plaintiffs' homosexuality did not impair the efficiency of the Navy, a member's homosexual conduct might in other circumstances cause difficulties, especially aboard a ship. Similarly, the other concerns expressed by the Navy might not apply

in any particular case, but do have some basis in fact. These considerations are adequate to sustain the regulation in its military context.

See also *Brown* v. *Glines*, 444 U.S. 348, 354 (1980). None of the cases relied on by petitioner (Pet. 22-23) involves the question whether homosexual activity is a legitimate ground for exclusion or discharge from the military.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1981

DOJ-1981-05

APPENDIX

DEPARTMENT OF THE NAVY
OFFICE OF THE SECRETARY
WASHINGTON, D.C. 20350

SECNAVINST 1900.9D
SO
12 March 1981

SECNAV INSTRUCTION 1900.9D

From: Secretary of the Navy

To: All Ships and Stations

Subj: Policy of the Department of the Navy concerning homosexuality

Ref: (a) SECNAV Instruction 1920.6
(b) DOD Directive 1332.14 of 29 Dec 1976 with Ch-2 of 16 Jan 1981 (NOTAL)

Encl: (1) Procedures applicable to enlisted members

1. *Purpose.* To prescribe policy and procedures applicable to members of the naval service with regard to homosexuality. This policy is applicable to all members of all components of the naval service. The procedures prescribed in enclosure (1) are applicable to enlisted members only.

2. *Cancellation.* SECNAVINST 1900.9C.

3. *Summary of Changes.* This instruction is a complete revision of SECNAVINST 1900.9C. Although there is no change in the Department of the Navy's policy regarding homosexuality, there are significant modifications in definitions, procedures, rules that determine when separation is mandatory and when retention is possible, reasons for separation, characterization of discharges and other areas.

4. *Policy.* Homosexuality is incompatible with military service. The presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual

conduct, seriously impairs the accomplishment of the military mission by adversely affecting the ability of the Navy and Marine Corps to maintain discipline, good order and morale, to foster mutual trust and confidence among service members, to insure the integrity of the system of rank and command, to facilitate assignment and worldwide deployment of service members who frequently must live and work under close conditions affording minimal privacy, to recruit and retain members of the naval service, to maintain the public acceptability of service in the Navy and Marine Corps and to prevent breaches of security. Such persons shall normally be separated from the naval service in accordance with this instruction.

5. *Definitions.* As used in this instruction:

a. Homosexual means a person, regardless of sex, who engages in, desires to engage in or intends to engage in homosexual acts.

b. Bisexual means a person who engages in, desires to engage in or intends to engage in homosexual and heterosexual acts.

c. A homosexual act means bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires.

6. *Procedure.* A member whose separation is warranted under paragraph 7b of this instruction shall be processed for administrative separation in accordance with applicable regulations. However, nothing herein precludes disciplinary action in accordance with the Uniform Code of Military Justice when such action is determined by proper authority to be appropriate under the circumstances. In this connection, there is no right on the part of any individual to demand trial by court martial in lieu of administrative processing.

a. Inquiry. A commanding officer (as used herein the term commanding officer shall include an officer in charge) who receives apparently reliable information indicating that separation of a member of his or her unit or organization is warranted under paragraph 7b of this instruction shall inquire thoroughly into the matter to determine all the facts and circumstances of the case. Great care and objectivity must be exercised to lawfully develop and document all pertinent facts. All persons involved should be thoroughly questioned and the relevant facts fully recorded. The nearest Naval Investigative Service Office will render professional investigative assistance and advice in appropriate cases. If the assistance of the Naval Investigative Service cannot be obtained in a reasonable time, the commanding officer should nevertheless proceed with the inquiry without delay.

b. Disposition. If, upon completion of the inquiry, the commanding officer determines that there is no probable cause to believe that separation of the member is warranted under paragraph 7b of this instruction, he or she should promptly terminate all action on the case. Otherwise, the commanding officer shall initiate administrative separation proceedings in accordance with applicable regulations. Officers shall be processed in accordance with reference (a). Enlisted members shall be processed in accordance with enclosure (1) to this instruction. The Chief of Naval Personnel and the Commandant of the Marine Corps may prescribe additional procedures consistent with this instruction and references (a) and (b).

7. *Bases for Administrative Separation*

a. A member may be administratively separated from the naval service on the basis of preservice, prior service or current service conduct or statements.

b. A member shall be separated under this instruction if, but only if, one or more of the following three approved findings is made:

(1) The member has engaged in, attempted to engage in or solicited another to engage in a homosexual act or acts unless there are approved further findings that:

(a) Such conduct is a departure from the member's usual and customary behavior; and

(b) Such conduct under all the circumstances is unlikely to recur; and

(c) Such conduct was not accomplished by use of force, coercion or intimidation by the member during a period of military service; and

(d) Under the particular circumstances of the case, the member's continued presence in the naval service is consistent with the interest of the naval service in proper discipline, good order and morale; and

(e) The member does not desire to engage in or intend to engage in homosexual acts.

(2) The member has stated that he or she is a homosexual or bisexual unless there is a further finding that the member is not a homosexual or bisexual.

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved) unless there are further findings that the member is not a homosexual or bisexual and that the purpose of the marriage or attempt was the avoidance or termination of military service.

8. *Reason for Separation and Characterization*

a. A Separation Under Other Than Honorable Conditions by reason of Homosexuality shall normally be issued if there is a finding that during the current term of service the member attempted, solicited or committed a homosexual act in one or more of the following circumstances:

(1) By using force, coercion or intimidation;

(2) With a person under 16 years of age;

(3) With a subordinate in circumstances that violate customary military superior-subordinate relationships;

(4) Openly in public view;

(5) For compensation;

(6) Aboard a military vessel or aircraft; or

(7) In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order or morale comparable to the impact of such activity aboard a vessel or aircraft.

b. In cases of undisclosed preservice Homosexuality that constitutes a fraudulent enlistment, the reason for and characterization of separation shall be in accordance with regulations governing separation by reason of Misconduct due to procurement of a fraudulent enlistment.

c. In all other cases, separation under this instruction shall be by reason of Homosexuality and the characterization of the discharge shall reflect the character of the member's service.

9. *Other Regulations.* For purposes of interpreting other Navy or Marine Corps regulations (e.g., to determine whether a reenlistment bonus should be recouped or whether separation for medical reasons should take precedence over separation for homosexuality) all separations

under this instruction shall be treated as having been by reason of Misconduct.

10. *Suspension of Separation.* Suspension of a separation by reason of homosexuality or fraudulent enlistment is not authorized when there is an approved finding that one or more of the circumstances identified in paragraph 7b has occurred. However, nothing in this instruction precludes retention of a member, under applicable procedures, for a limited period of time in the interests of national security when authorized by the Secretary of the Navy.

11. *Transition.* A member who has been notified of administrative processing may be processed in accordance with SECNAV Instruction 1900.9C provided that the official letter of notification to the member is dated no later than 30 days after the date of this instruction. In such cases, the Discharge Authority shall process the case in accordance with the guidance contained in and applicable to SECNAV Instruction 1900.9C. In all other cases, processing shall be in accordance with this instruction.

/s/ John Lehman

John Lehman
Secretary of the Navy

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Procedures Applicable to Enlisted Members
Processed under SECNAVINST 1900.9D

1. All enlisted members being considered for separation under this instruction shall have the right to request an Administrative Discharge Board, subject to the following provisions:

a. The Board shall follow Bureau of Naval Personnel Manual or Marine Corps Separation and Retirement Manual procedures, as appropriate, except:

(1) If the Board finds that one or more of the circumstances authorizing separation under paragraph 7b of this instruction is supported by the evidence, the Board shall recommend separation unless the Board finds that retention is warranted under the limited circumstances described therein.

(2) If the Board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation under paragraph 7b has occurred, the Board shall recommend retention unless the case involves another basis for separation of which the member has been duly notified.

b. Normally, the Chief of Naval Personnel or the Commandant of the Marine Corps, as appropriate, is the Discharge Authority. The Discharge Authority shall dispose of the case as follows:

(1) If the Board recommends retention, the Discharge Authority shall:

(a) Approve the finding and direct retention; or

(b) Forward the case to the Secretary of the Navy with a recommendation that the Secretary separate the member for the convenience of the government.

(2) If the Board recommends separation, the Discharge Authority shall:

(a) Approve the finding and direct separation; or

(b) Disapprove the finding on the basis that:

1 There is insufficient evidence to support the finding; or

2 There is sufficient evidence to warrant a finding that supports retention under the limited circumstances described in paragraph 7b of this instruction.

(3) If there has been a waiver of Board proceedings, the Discharge Authority shall dispose of the case in accordance with the following provisions:

(a) If the Discharge Authority determines that there is not sufficient evidence to support separation under paragraph 7b, the Discharge Authority shall direct retention unless there is another basis for separation of which the member has been duly notified.

(b) If the Discharge Authority determines that one or more of the circumstances authorizing separation under paragraph 7b has occurred, the member shall be separated unless retention is warranted under the limited circumstances described therein.

2. The burden of proving that retention is warranted under the limited circumstances described in paragraph 7b rests with the member except in cases where the member's conduct was solely the result of a desire to avoid or terminate military service.

3. Findings regarding the existence of the limited circumstances warranting a member's retention under paragraph 7b are required only if:

a. The member, either personally or through counsel, asserts to the Board or, when there has been a waiver of Board proceedings, to the Discharge Authority that one or more such limited circumstances exists; or

b. The Board or Discharge Authority relies upon such circumstances to justify the member's retention.